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No. 10490

United States
Circuit Court of Appeals
For the Ninth Circuit.

IDAHO POTATO GROWERS, INC., W. P. WILSON, L. S. TAUBE, TED TAUBE and L. B. HOLDEN, Co-partners, doing business as L. S. TAUBE & COMPANY, MEYER FRIEDMAN and ARTHUR E. FRIEDMAN, Co-partners, doing business as S. FRIEDMAN & SONS, IDAHO FALLS WAREHOUSE COMPANY, ROWENA O'NEILL, Administratrix of the Estate of J. E. O'Neill, deceased, A. G. STUART, C. R. HOLDEN and L. L. HOLDEN, Co-partners, doing business as HOLDEN BROTHERS and IDAHO TRAFFIC ASSOCIATION,

Petitioners,

vs.


NATIONAL LABOR RELATIONS BOARD,

Respondent.

Transcript of Record
In Two Volumes
VOLUME I
Pages 1 to 396

Upon Petition for Review and Petition for Enforcement of
Order of the National Labor Relations Board

DEC 31 1943



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No. 10490

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IDAHO POTATO GROWERS, INC., W. P. WILSON, L. S. TAUBE, TED TAUBE and L. B. HOLDEN, Co-partners, doing business as L. S. TAUBE & COMPANY, MEYER FRIEDMAN and ARTHUR E. FRIEDMAN, Co-partners, doing business as S. FRIEDMAN & SONS, IDAHO FALLS WAREHOUSE COMPANY, ROWENA O'NEILL, Administratrix of the Estate of J. E. O'Neill, deceased, A. G. STUART, C. R. HOLDEN and L. L. HOLDEN, Co-partners, doing business as HOLDEN BROTHERS and IDAHO TRAFFIC ASSOCIATION,

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Order of the National Labor Relations Board

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Affidavit as to Service (Board's Exhibit 1-N) ..	59
Amended Charges:	
XIX-C-1116 (Board's Exhibit 1-B)	5
XIX-C-1117 (Board's Exhibit 1-C)	9
XIX-C-1118 (Board's Exhibit 1-D)	12
XIX-C-1125 (Board's Exhibit 1-E)	16
XIX-C-1127 (Board's Exhibit 1-F)	19
XIX-C-1131 (Board's Exhibit 1-G)	22
XIX-C-1129 (Board's Exhibit 1-H)	25
Amended Charge, Second (Board's Exhibit 1-K)	38
Answer to Complaint (Board's Exhibit 1-P) ..	60
Answer of the National Labor Relations Board and Request for Enforcement	163
Certificate of the National Labor Relations Board	172
Complaint, Consolidated (Board's Exhibit 1-L)	41
Corrected Order Consolidating Cases (Board's Exhibit 1-J)	31
Decision and Order	67

Index	Page
Exhibits for National Labor Relations Board—(Continued):	
4—Payroll period next Preceding Feb. 13, 1942, W. P. Wilson.....	286
5—Payroll Report of L. S. Taube & Co., Inc.	287
6—Payroll Report of S. Friedman & Sons	290
7—List of Potato Sorters at Idaho Falls Bonded Warehouse, Feb. 16 and April 20, 1942	291
8—Payroll, February, April, J. E. O'Neil	292
9—Payroll, Feb. 16-21, A. G. Stuart..	293
10—Payroll, Feb. 6-13, 1942—Holden Bros. Inc.	294
11—Copy of Letter, Feb. 10, 1942, Lee W. Owen, Sec.-Treas. Truck Driv- ers and Warehousemen's Local Union #983 to W. P. Wilson...	300
12—Letter, Feb. 13, 1942, Lee W. Owen to Holden Brothers	301
13—Letter, Feb. 13, 1942, Lee W. Owen to Idaho Falls Potato Grow- ers Assn.	302

Index	Page
Exhibits for National Labor Relations Board—(Continued):	
14—Letter, Feb. 13, 1942, Lee W. Owen to J. E. O'Neil	302
15—Letter, Feb. 13, 1942, Lee W. Owen to Friedman and Son	303
16—Letter, Feb. 13, 1942, Lee W. Owen to L. S. Taube & Co.	304
17—Letter, Feb. 16, 1942, Lee W. Owen to Idaho Falls Bonded Warehouse	304
18—Letter, Feb. 16, 1942, Lee W. Owen to A. G. Stewart	305
19—Letter, Feb. 24, 1942, Eli A. Weston to Lee W. Owen	306
20—Letter, Mar. 4, 1942, Lee W. Owen to W. P. Wilson	308
22—Letter, Mar. 7, 1942, W. P. Wilson to Teamsters, Chauffeurs, Warehousemen & Helpers	309
23—Letter, Mar. 8, 1942, E. A. Weston to Lee W. Owens	310
24—Letter, Mar. 10, 1942, Lee W. Owen to Idaho Falls Bonded Warehouse	311
25—Letter, Mar. 10, 1942, Lee W. Owen to A. G. Stewart	311

Index	Page
Witnesses for National Labor Relations Board:	
Hansen, Farrel L.	
—direct	234
—redirect	257, 259
—recross	258
—recalled, direct	461
—redirect	498
—surrebuttal, direct	727
Hansen, Raymond L.	
—direct	403
—cross	442
—redirect	454, 457
Hendricksen, Jack Cormi	
—direct	566
Holden, C. R.	
—direct	181
—recalled, direct	397
—cross	401
Holden, L. B.	
—direct	208
—cross	226
—redirect	228, 233
—recross	229
Jones, R. I.	
—direct	457

Index	Page
Witnesses for National Labor Relations Board—(Continued) :	
Long, Lester James	
—rebuttal, direct	718
—cross	721
Moore, Clifford	
—direct	602
Moore, Ross	
—direct	578
—cross	588
Moore, Willard	
—direct	589
—recross	601
Owen, L. W.	
—direct	325
—cross	389
—redirect	395
Rash, Milo	
—direct	528
—cross	558
—redirect	565
—recalled, cross	615
—rebuttal, direct	723
—cross	726
Sorman, Swen W.	
—direct	575

Index	Page
Witnesses for National Labor Relations Board—(Continued) :	
Stanger, A. G.	
—direct	261
Wadsworth, Clency Lorenzo	
—direct	610, 612
Waldon, Preston	
—direct	611
Wolfgang, R. A.	
—direct	515
Witnesses for Respondents:	
Gustafson, Fred	
—direct	648
—cross	651
Hansen, Farrel L.	
—direct	645
—cross	646
—recalled, redirect	689
—recross	704, 715
Holden, Lloyd B.	
—direct	666
—cross	675
—recross	678, 683
—redirect	682

Index Page

Witnesses for Respondents—(Continued):

Johnson, Emil C.

—direct	659
—cross	662
—redirect	663

Norell, Ernest

—direct	653
—cross	655
—redirect	655
—recross	656

West, Lewis Leslie

—direct	658
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BOARD'S EXHIBIT No. 1-A

United States of America
National Labor Relations Board

I, Beatrice M. Stern, Executive Secretary of the National Labor Relations Board, and official custodian of its records, do hereby certify that attached is a full, true, and complete copy of: Order Consolidating Cases

In the Matter of:

Idaho Falls Potato Growers Association and Teamsters, Chauffeurs, Warehousemen and Helpers Local 983, A. F. L. Case No. XIX-C-1116

W. P. Wilson and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A. F. L. Case No. XIX-C-1117

L. S. Taube & Company and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A. F. L. Case No. XIX-C-1118

Atlantic Commission Company and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A. F. L. Case No. XIX-C-1122

S. Freedman & Sons Produce Company and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A. F. L. Case No. XIX-C-1125

Idaho Falls Bonded Warehouse and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A. F. L. Case No. XIX-C-1127

J. E. O'Neil Warehouse and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A. F. L. Case No. XIX-C-1129

A. G. Stewart and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A. F. L. Case No. XIX-C-1131

Holden Brothers, Incorporated and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A. F. L. Case No. XIX-C-1137

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the National Labor Relations Board to be affixed this 1st day of August A. D. 1942, at Washington, D. C.

[Seal]

BEATRICE M. STERN

Executive Secretary.

United States of America
Before The National Labor Relations Board

In the Matter of

Case No. XIX-C-1116

IDAHO FALLS POTATO GROWERS ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1117

W. P. WILSON

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1118

L. S. TAUBE & COMPANY

and

**TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.**

Case No. XIX-C-1122

ATLANTIC COMMISSION COMPANY

and

**TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.**

Case No. XIX-C-1125

S. FREEDMAN & SONS PRODUCE COMPANY

and

**TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.**

Case No. XIX-C-1127

IDAHO FALLS BONDED WAREHOUSE

and

**TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.**

Case No. XIX-C-1129

J. E. O'NEIL WAREHOUSE

and

**TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.**

Case No. XIX-C-1131

A. G. STEWART

and

**TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.**

Case No. XIX-C-1137

HOLDEN BROTHERS, INCORPORATED

and

**TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.****ORDER CONSOLIDATING CASES**

Charges, pursuant to Section 10(b) of the Act, having been filed in the above-entitled cases, and the Board having duly considered the matter, and deeming it necessary in order to effectuate the purposes of the National Labor Relations Act,

It Is Hereby Ordered, pursuant to Article II, Section 36 (b) of National Labor Relations Board Rules and Regulations—Series 2, as amended, that these cases be, and they hereby are, consolidated.

Dated, Washington, D. C., July 31, 1942.

By direction of the Board:

[Seal] BEATRICE M. STERN

Executive Secretary

BOARD'S EXHIBIT No. 1-B

United States of America

Before The National Labor Relations Board

Nineteenth Region

Case No. XIX-C-1116

Dated Filed April 6, 1942

Amended August 26, 1942

In the Matter of—

IDAHO FALLS POTATO GROWERS ASSOCI-
ATION AND IDAHO TRAFFIC ASSOCIA-
TION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Idaho Falls Potato Growers Association and Idaho Traffic Association at Idaho Falls, Idaho employing 60 workers in sorting, packing, warehousing, shipping and selling potatoes have engaged in and are engaging in unfair labor practices within

the meaning of Section 8 subsections (1) and (3) and (5) of said Act, in that said Idaho Falls Potato Growers Association, on or about February 24, 1942, demoted Milo Rash and forced him to quit his position with the Association, or discharged the said Milo Rash from its employ and at all times since said date has failed and refused to reinstate the said Milo Rash to his former position or to reemploy the said Milo Rash at a position to which he was entitled because of his membership in and activities on behalf of the undersigned labor organization, and has thereby violated and is thereby violating Section 8, subsection (3) of said Act.

The Idaho Traffic Association has acted in the interest of and on behalf of the Idaho Falls Potato Growers Association with respect to labor relations and other matters, and is an employer within the meaning of Section 2, subsection (2) of the National Labor Relations Act.

Since on and before February 13, 1942 the undersigned union has been designated as their bargaining agency by a majority of the employees of Idaho Falls Potato Growers Association at its Idaho Falls and Shelley, Idaho plants, in a unit appropriate for purposes of collective bargaining, namely, all employees of said employer in its cellar and warehouse crews at said towns, exclusive of office employees and supervisory employees of higher rank than cellar crew foremen. Although requested to do so, said Association has directly and by and through the Idaho Traffic Association, acting in the interest of and on behalf of said Idaho Falls

Potato Growers Association, at all times since on or about February 13, 1942 failed and refused to recognize the undersigned union as the exclusive bargaining representative of said employees and to bargain collectively with said union with respect to rates of pay, wages, hours and other conditions of employment for said employees. By said failure and refusal the Idaho Falls Potato Growers Association and the Idaho Traffic Association have violated and are violating Section 8, subsection (5) of said Act.

The Idaho Falls Potato Growers Association, through its manager, Ferrill Hansen; and Idaho Traffic Association, acting in the interest of and on behalf of Idaho Falls Potato Growers Association, have made public statements attacking the undersigned union and the integrity of its representatives, and discouraging membership in the said union. The said Associations have, through the said Ferrill Hansen and other agents, participated in and encouraged an organized movement in Eastern Idaho by representatives of the Idaho State Grange and subdivisions thereof, and other purported representatives of farmers, the Idaho Falls Traffic Association and other potato packing and shipping concerns, to attack and vilify the undersigned organization, its affiliates and representatives, prevent employers from signing agreements with said union, and generally discourage membership in said union, and interfere with and restrain its activities. By such activities and other

acts and statements the Associations have interfered with, restrained and coerced and are interfering with, restraining and coercing their employees and the employees of other employers in the vicinity of Idaho Falls in the exercise of the rights guaranteed to them in Section 7 of the Act and have violated and are violating Section 8, subsection (1) of the Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND
HELPERS, LOCAL 983, A.
F. L.

By LEE W. OWEN

Secretary-Treasurer
140 South First Avenue,
Pocatello, Idaho

Subscribed and sworn to before me this 24th day
of August, 1942 At Idaho Falls, Ida.

LOUIS S. PENFIELD
Attorney
NLRB, Region 19

BOARD'S EXHIBIT No. 1-C

United States of America
Before The National Labor Relations Board
Nineteenth Region

Case No. XIX-C-1117

Date Filed April 6, 1942
Amended August 26, 1942.

In the Matter of—

W. P. WILSON AND IDAHO TRAFFIC ASSO-
CIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that W. P. Wilson at Firth, Idaho, and Idaho Traffic Association at Idaho Falls, Idaho employing 40 workers in sorting, packing, warehousing, shipping and selling potatoes, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that since on or before February 10 the undersigned union has been designated as the collective bargaining agent by a majority of the employees of said firm at its plant at Firth, Idaho in a unit appropriate for the purpose of collective bargaining, namely, all employees of this firm in

its warehouse and cellar crews, exclusive of office employees and supervisory employees of higher rank than cellar crew foremen. Although requested to do so, said firm and Idaho Traffic Association, acting in the interest of and on behalf of said firm, have at all times since on or about February 10, 1942 failed and refused to recognize the undersigned union as the exclusive bargaining representative of said employees and to bargain collectively with said union with respect to rates of pay, wages, hours and other conditions of employment for said employees. By said failure and refusal W. P. Wilson and said Association have violated and are violating Section 8, subsection (5) of said Act.

W. P. Wilson and Idaho Traffic Association have, beginning with the month of January 1942, by and through Carl DeLong, E. A. Weston, Ferrill Hansen, and other agents, participated in and encouraged an organized movement in southeastern Idaho among potato shippers, farmers and Granges to attack and villify the undersigned union, its affiliates and representatives, prevent employers from signing agreements with said union and discourage membership in said union and interfere with and restrain its activities.

The Idaho Traffic Association has acted and is acting in the interest of and on behalf of W. P. Wilson in labor relations and other matters, and is an employer within the meaning of Section 2, subsection (2) of the Act.

By the acts and statements above described and by other acts and statements, the said employers

interfered with, restrained and coerced and are interfering with, restraining and coercing their employees in the exercise of the rights guaranteed to them in Section 7 of the said Act and have violated and are violating Section 8, subsection (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND
HELPERS, LOCAL 983, A.
F. L.

By LEE W. OWEN

Secretary-Treasurer
140 South First Avenue,
Pocatello, Idaho

Subscribed and sworn to before me this 24th day of August, 1942. At Idaho Falls, Ida.

LOUIS S. PENFIELD

Attorney
NLRB, Region 19

BOARD'S EXHIBIT No. 1-D

United States of America
Before The National Labor Relations Board
Nineteenth Region

Case No. XIX-C-1118

Dated Filed April 6, 1942
Amended: August 26, 1942.

In the Matter of—

L. S. TAUBE, TED TAUBE, AND L. B. HOL-
DEN, CO-PARTNERS, D.B.A., L. S. TAUBE
& COMPANY: AND IDAHO TRAFFIC
ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that L. S. Taube, Ted Taube, and L. B. Holden, Co-partners, D.B.A., L. S. Taube & Company at Idaho Falls and Shelley, Idaho: Idaho Traffic Association at Idaho Falls, Idaho employing 60 workers in sorting, packing, shipping, warehousing and selling potatoes, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (3) and (5) of said Act, in that said L. S. Taube & Company, on or

about February 5, 1942, discharged from its employ the employees hereinafter named, and at all times since said date has failed or refused to reinstate or re-employ any of said employees because of their membership in and activities on behalf of the undersigned labor organization, and has thereby violated and is thereby violating Section 8, subsection (3) of said Act: Mervin Crandall, Jack Hendrickson, Willard Moore, Harold Goodell, Clency Wadsworth, C. A. Falk.

Said L. S. Taube & Company, by and through Carl Metcalf, a supervisory employee, did, during the months of January and February 1942, make statements to its employees criticizing and condemning the undersigned union and its representatives, and discouraging membership in the union.

Since on and before February 13, 1942 the undersigned union has been designated as their collective bargaining representative by a majority of the employees of said L. S. Taube & Company in its Idaho Falls and Shelley operations in a unit appropriate for the purposes of collective bargaining, namely, all employees of L. S. Taube & Company in its sheds and cellar crews at said operations, excluding office employees and supervisory employees of higher rank than cellar crew foremen. Although requested to do so, said L. S. Taube & Company and Idaho Traffic Association, acting in the interest of and on behalf of said L. S. Taube & Company, have at all times since said date failed and refused to recognize or bargain collectively with the undersigned union as the collective bargaining

representative of said employees with respect to rates of pay, wages, hours and other conditions of employment. By said refusal the L. S. Taube & Company and the Idaho Traffic Association have violated and are violating Section 8, subsection (5) of said Act.

Said L. S. Taube & Company and Idaho Traffic Association have, beginning with the month of January 1942, through Carl DeLong, E. A. Weston, Ferrill Hansen, L. B. Holden and other agents, participated in and encouraged an organized movement in southeastern Idaho among potato shippers, farmers, and Granges to attack and villify the undersigned union, its affiliates and representatives, prevent employers from signing agreements with said union and discourage membership in said union and interfere with and restrain its activities. The Idaho Traffic Association has acted and is acting in the interest of and on behalf of L. S. Taube & Company in labor relations and other matters, and is an employer within the meaning of Section 2, subsection (2) of the Act.

By the acts and statements above described and by other acts and statements, the said L. S. Taube & Company and the Idaho Traffic Association interfered with, restrained and coerced and are interfering with, restraining and coercing their employees in the exercise of the rights guaranteed to them in Section 7 of the said Act, and have violated and are violating Section 8, subsection (1) of said Act.

The undersigned further charges that said unfair

labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND
HELPERS, LOCAL 983, A.
F. L.

By LEE W. OWEN

Secretary-Treasurer
140 South First Avenue,
Pocatello, Idaho

Subscribed and sworn to before me this 24th day
of August, 1942 At Idaho Falls, Ida.

LOUIS S. PENFIELD

Attorney
NLRB, Region 19

BOARD'S EXHIBIT No. 1-E

United States of America
Before The National Labor Relations Board
Nineteenth Region

Case No. XIX-C-1125

Dated Filed April 10, 1942

Amended August 26, 1942

In the Matter of—

MEYER FRIEDMAN AND ARTHUR E.
FRIEDMAN, C O - P A R T N E R S, DBA S.
FRIEDMAN & SONS AND IDAHO TRAF-
FIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

AMENDED CHARGE

Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that Meyer Friedman and Arthur E. Friedman, Co-partners, DBA S. Friedman & Sons at Idaho Falls, Idaho, and Idaho Traffic Association at Idaho Falls, Idaho employing 25 workers in sorting, packing, shipping, warehousing and selling potatoes, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that since on and before February 13, 1942 the undersigned union

has been designated as their collective bargaining agent by a majority of the employees of S. Friedman & Sons at its Idaho Falls plant, in a unit appropriate for the purposes of collective bargaining, namely, all employees of the company in its warehouse and cellar crews, exclusive of office employees and supervisory employees of higher rank than cellar crew foremen. Although requested to do so, said company and Idaho Traffic Association acting in the interest of and on behalf of said company have at all times since on or about February 13, 1942 failed and refused to recognize the undersigned union as the exclusive bargaining representative of said employees and to bargain collectively with said union with respect to rates of pay, wages, hours and other conditions of employment for said employees. By said failure and refusal the company and Idaho Traffic Association have violated and are violating Section 8, subsection (5) of said Act.

S. Friedman & Sons and Idaho Traffic Association have, beginning with the month of January 1942, by and through Carl DeLong, E. A. Weston, Ferrill Hansen and other agents, participated in and encouraged an organized movement in southeastern Idaho among potato shippers, farmers and Granges to attack and villify the undersigned union, its affiliates and representatives, prevent employers from signing agreements with said union and discourage membership in said union, and interfere with and restrain its activities.

The Idaho Traffic Association has acted and is

acting in the interest of and on behalf of S. Friedman & Sons in labor relations and other matters, and is an employer within the meaning of Section 2, subsection (2) of the Act.

By the acts and statements above described and by other acts and statements, the said employers interfered with, restrained and coerced, and are interfering with, restraining and coercing their employees in the exercise of the right guaranteed to them in Section 7 of the said Act and have violated and are violating Section 8, subsection (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND
HELPERS, LOCAL 983, A.
F. L.

By LEE W. OWEN

Secretary-Treasurer
140 South First Avenue,
Pocatello, Idaho

Subscribed and sworn to before me this 24th day
of August, 1942 At Idaho Falls, Idaho.

LOUIS S. PENFIELD

Attorney

NLRB, Reg. 19

BOARD'S EXHIBIT No. 1-F

United States of America

Before The National Labor Relations Board

Nineteenth Region

Case No. XIX-C-1127

Date Filed April 10, 1942

Amended August 26, 1942

In the Matter of—

IDAHO FALLS WAREHOUSE COMPANY
AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that Idaho Falls Warehouse Company and Idaho Traffic Association at Idaho Falls, Idaho employing 25 workers in sorting, packing, shipping, warehousing and selling potatoes have engaged in and are

engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that since on and before February 16, 1942 the undersigned union has been designated as their collective bargaining agent by a majority of the employees of the Idaho Falls Warehouse Company at its Idaho Falls plant in a unit appropriate for the purposes of collective bargaining, namely, all employees of the company in its warehouse and cellar crews, exclusive of office employees and supervisory employees of higher rank than cellar crew foremen. Although requested to do so, said company and Idaho Traffic Association, acting in the interest of and on behalf of said company, have at all times since on or about February 16, 1942 failed and refused to recognize the undersigned union as the exclusive bargaining representative of said employees and to bargain collectively with said union with respect to rates of pay, wages, hours and other conditions of employment for said employees. By said failure and refusal the company and Idaho Traffic Association have violated and are violating Section 8, subsection (5) of said Act.

Said company and Association have, beginning with the month of January, 1942, by and through A. G. Stanger, Carl DeLong, E. A. Weston, Ferrill Hansen and other agents, participated in and encouraged an organized movement in southeastern Idaho among potato shippers, farmers and Granges to attack and villify the undersigned union, its affiliates and representatives, prevent employers from signing agreements with said union and discourage

membership in said union and interfere with and restrain its activities.

The Idaho Traffic Association has acted and is acting in the interest of and on behalf of Idaho Falls Warehouse Company in labor relations and other matters, and is an employer within the meaning of Section 2, subsection (2) of the Act.

By the acts and statements above described and by other acts and statements, the said employers interfered with, restrained and coerced and are interfering with, restraining and coercing their employees in the exercise of the rights guaranteed to them in Section 7 of the said Act, and have violated and are violating Section 8, subsection (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation or organization, and name and official position of the person acting for the organization.)

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND
HELPERS, LOCAL 983, A.
F. L.

By LEE W. OWEN

Secretary-Treasurer
140 South First Avenue,
Pocatello, Idaho

Subscribed and sworn to before me this 24th day of August, 1942. At Idaho Falls, Idaho.

LOUIS S. PENFIELD

Attorney NLRB

Region 19

BOARD'S EXHIBIT No. 1-G

United States of America

Before The National Labor Relations Board

Nineteenth Region

Case No. XIX-C-1131

Dated Filed April 10, 1942

Amended August 26, 1942

In the Matter of—

A. G. STEWART AND

IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that A. G. Stewart at Shelley, Idaho, and Idaho Traffic Association at Idaho Falls, Idaho employing 15 workers in sorting, packing, shipping, warehousing and selling potatoes have engaged in and are engag-

ing in unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that since on and before February 16, 1942 the undersigned union has been designated as their collective bargaining agent by a majority of the employees of A. G. Stewart at its Shelley, Idaho plant in a unit appropriate for the purposes of collective bargaining, namely, all employees of A. G. Stewart in his warehouse and cellar crews, exclusive of office employees and supervisory employees of higher rang than cellar crew foremen. Although requested to do so A. G. Stewart and Idaho Traffic Association acting in the interest of and on behalf of said A. G. Stewart, have at all times since on or about February 16, 1942 failed and refused to recognize the undersigned union as the exclusive bargaining representative of said employees and to bargain collectively with said union with respect to rates of pay, wages, hours and other conditions of employment for said employees. By said failure and refusal A. G. Stewart and Idaho Traffic Association have violated and are violating Section 8, subsection (5) of said Act.

Said A. G. Stewart and Idaho Traffic Association have, beginning with the month of January, 1942, through Carl DeLong, E. A. Weston, Ferrill Hansen, and other agents, participated in and encouraged an organized movement in southeastern Idaho among potato shippers, farmers, and Granges to attack and villify the undersigned union, its affiliates and representatives, prevent employers from signing agreements with said union and discourage

membership in said union and interfere with and restrain its activities.

The Idaho Traffic Association has acted and is acting in the interest of and on behalf of A. G. Stewart in labor relations and other matters, and is an employer within the meaning of Section 2, subsection (2) of the Act.

By the cast and statements above described and by other acts and statements, the said employers interfered with, restrained and coerced and are interfering with, restraining and coercing their employees in the exercise of the rights guaranteed to them in Section 7 of the said Act and have violated and are violating Section 8, subsection (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND
HELPERS, LOCAL 983, A.
F. L.

By LEE W. OWEN

Secretary-Treasurer
140 South First Avenue,
Pocatello, Idaho

Subscribed and sworn to before me this 24th day
of August, 1942 At Idaho Falls, Ida.

LAURA S. PENFIELD

Attorney

NLRB, Region 19

BOARD'S EXHIBIT No. 1-H

United States of America, Before the National
Labor Relations Board, Nineteenth Region

Case No. XIX-C-1129

Date Filed April 10, 1942

Amended September 18, 1942

In the Matter of—

ROWENAH O'NEIL, Administratrix of the Estate
of J. E. O'NEIL, deceased; and IDAHO
TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

AMENDED CHARGE

Pursuant to Section 10 (b) of the National La-
bor Relations Act, the undersigned hereby charges
that Rowenah O'Neil, Administratrix of the Estate
of J. E. O'Neil, Deceased; and Idaho Traffic Asso-
ciation at Idaho Falls, Idaho, employing 30 work-
ers in sorting, packing, shipping, warehousing and
selling potatoes, has engaged in and is engaging

in 'unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that beginning with about February 13, 1942 the undersigned union had been designated as their collective bargaining agent by a majority of the employees of J. E. O'Neil at his Idaho Falls plant in a unit appropriate for the purposes of collective bargaining, namely, all the employees of the employer in his warehouse and cellar crews, exclusive of office employees and supervisory employees of higher rank than cellar crew foremen. Although requested to do so, J. E. O'Neil and Idaho Traffic Association, acting in the interest of and on behalf of said J. E. O'Neil, beginning with about February 13, 1942, failed and refused to recognize the undersigned union as the exclusive bargaining representative of said employees and to bargain with said union collectively with respect to rates of pay, wages, hours and other conditions of employment for said employees. By said failure and refusal the said J. E. O'Neil and Idaho Traffic Association have violated Section 8, subsection (5) of said Act.

J. E. O'Neil and Idaho Traffic Association, beginning with the month of January, 1942, directly and through Carl DeLong, E. A. Weston, Ferrill Hansen and other agents, participated in and encouraged an organized movement in southeastern Idaho among potato shippers, farmers and Granges to attack and villify the undersigned union, its affiliates and representatives, prevent employers from signing agreements with said union and discourage

membership in said union and interfere with and restrain its activities.

The Idaho Traffic Association has acted in the interest of and on behalf of J. E. O'Neil in labor relations and other matters, and is an employer within the meaning of Section 2, subsection (2) of the Act.

By the acts and statements above described and by other acts and statements, the said employers have interfered with, restrained and coerced their employees in the exercise of the rights guaranteed to them in Section 7 of the said Act, and have violated Section 8, sub-section (1) of said act. J. E. O'Neil died on or about August 9, 1942, and Rowenah O'Neil is the duly appointed and acting Administratrix of his estate.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND
HELPERS, LOCAL 983,
A.F.L.

LEE W. OWEN,

Secretary-Treasurer, 140
South First Avenue, Pocatello, Idaho.

Subscribed and sworn to before me this 3d day
of September, 1942, at Pocatello, Idaho.

[Seal]

LESLIE M. WHITE,

Notary Public, Residing at
Pocatello, Idaho.

My Commission expires July 5, 1946.

BOARD'S EXHIBIT No. 1-I

United States of America
Before the National Labor Relations Board

Case No. XIX-C-1116

In the Matter of

IDAHO FALLS POTATO GROWERS ASSOCI-
ATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1117

W. P. WILSON

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1118

L. S. TAUBE & COMPANY

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1122

ATLANTIC COMMISSION COMPANY

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1125

S. FREEDMAN & SONS PRODUCE COMPANY

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1127

IDAHO FALLS BONDED WAREHOUSE

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1129

J. E. O'NEIL WAREHOUSE

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1131

A. G. STEWART

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1137

HOLDEN BROTHERS, INCORPORATED

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

ORDER SEVERING CASE

Charges, pursuant to Section 10(b) of the Act, having been filed in the above-entitled cases, the Board, by Order duly made, having consolidated these cases, and the Board deeming it necessary in order to effectuate the purposes of the National Labor Relations Act,

It Is Hereby Ordered, pursuant to Article II, Section 36 (d) of National Labor Relations Board Rules

and Regulations—Series 2, as amended, that Case No. XIX-C-1122 be, and it hereby is, severed.

Dated, Washington, D. C., September 15, 1942.

By direction of the Board:

[Seal] BEATRICE M. STERN,
Executive Secretary.

BOARD'S EXHIBIT No. 1-J

United States of America
Before the National Labor Relations Board

In the Matter of

Case No. XIX-C-1116

IDAHO FALLS POTATO GROWERS ASSOCI-
ATION AND IDAHO TRAFFIC ASSOCIA-
TION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1117

W. P. WILSON AND IDAHO TRAFFIC ASSO-
CIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1118

L. S. TAUBE, TED TAUBE, AND L. B. HOLDEN, CO-PARTNERS, D.B.A., L. S. TAUBE & COMPANY: AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1125

MEYER FRIEDMAN AND ARTHUR E. FRIEDMAN, CO-PARTNERS, DBA S. FRIEDMAN & SONS AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1127

IDAHO FALLS WAREHOUSE COMPANY AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1129

ROWENAH O'NEIL, ADMINISTRATRIX OF
THE ESTATE OF J. E. O'NEIL, DE-
CEASED; AND IDAHO TRAFFIC ASSO-
CIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1131

A. G. STEWART AND IDAHO TRAFFIC AS-
SOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1137

HOLDEN BROTHERS, INCORPORATED, AND
IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

CORRECTED ORDER CONSOLIDATING
CASES

Charges and amended charges, pursuant to Sec-
tion 10(b) of the Act, having been filed in the above-
entitled cases, the Board, by Order duly made, hav-

ing consolidated these cases, and it appearing that the caption of the said Order incorrectly designated the parties,

It Is Hereby Ordered, pursuant to Article II, Section 36 (b) of National Labor Relations Board Rules and Regulations—Series 2, as amended, that these cases be, and they hereby are, consolidated.

Dated, Washington, D. C., September 30, 1942.

By direction of the Board:

BEATRICE M. STERN,
Executive Secretary.

BOARD'S EXHIBIT No. 1-J-1

United States of America
Before the National Labor Relations Board

In the Matter of
Case No. XIX-C-1116

IDAHO FALLS POTATO GROWERS ASSOCI-
ATION AND IDAHO TRAFFIC ASSOCI-
ATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1117

W. P. WILSON AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1118

L. S. TAUBE, TED TAUBE, AND L. B. HOLDEN, CO-PARTNERS, D.B.A., L. S. TAUBE & COMPANY: AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1125

MEYER FRIEDMAN AND ARTHUR E. FRIEDMAN, CO-PARTNERS, DBA S. FRIEDMAN & SONS AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1127

IDAHO FALLS WAREHOUSE COMPANY
AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1129

ROWENAH O'NEIL, ADMINISTRATRIX OF
THE ESTATE OF J. E. O'NEIL, DE-
CEASED; AND IDAHO TRAFFIC ASSO-
CIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1131

A. G. STEWART AND IDAHO TRAFFIC AS-
SOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1137

C. R. HOLDEN and L. L. HOLDEN, COPART-
NERS, d/b/a HOLDEN BROTHERS AND
IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

SECOND CORRECTED ORDER CONSOLI-
DATING CASES

Charges and amended charges, pursuant to Section 10(b) of the Act, having been filed in the above-entitled cases, the Board, by Order duly made, having consolidated these cases, and it appearing that the caption of the said Order incorrectly designated the parties,

It Is Hereby Ordered, pursuant to Article II, Section 36(b) of National Labor Relations Board Rules and Regulations—Series 2, as amended, that these cases be, and they hereby are, consolidated.

Dated, Washington, D. C., October 14, 1942.

By direction of the Board:

BEATRICE M. STERN,
Executive Secretary.

BOARD'S EXHIBIT No. 1-K

United States of America
Before the National Labor Relations Board,
Nineteenth Region

Case No. XIX-C-1137

Date Filed April 27, 1942

Amended 8/26, 1942

Amended Oct. 9, 1942

In the Matter of—

C. R. HOLDEN AND L. L. HOLDEN, co-part-
ners, d/b/a HOLDEN BROTHERS, AND
IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

SECOND AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that C. R. Holden and L. L. Holden, co-partners, d/b/a Holden Brothers, & Idaho Traffic Association at Idaho Falls, Idaho, employing 40 workers in sorting, packing, warehousing, shipping and selling potatoes have engaged in and are engaging in unfair labor practices within the meaning of Section 8 subsections (1) and (5) of said Act, in that since on and before February 13, 1942, a majority of all warehouse and cellar crew employees, exclu-

sive of office employees and supervisory employees of higher rank than cellar crew foremen, of Holden Brothers Inc., hereinafter called the corporation, and C. R. Holden and L. L. Holden a co-partnership doing business as Holden Brothers, successor to the corporation and hereinafter called the partnership has designated the undersigned union as their exclusive agent for the purposes of collective bargaining. Although requested to do so, the corporation on Feb. 13, 1942, and at all times thereafter during its existence, and the partnership, its successor, at all times since its formation, and Idaho Traffic Association acting in behalf of said corporation and partnership at all times since Feb. 12, 1942, have failed and refused to recognize the undersigned union as the exclusive bargaining representative of said employees and to bargain collectively with said union with respect to rates of pay, wages, hours and other conditions of employment for said employees. By said failure and refusal the corporation has violated and the partnership and Idaho Traffic Association have violated and are violating Section 8, subsection (5) of said Act.

The corporation and Idaho Traffic Association have beginning with the month of January, 1942, by and through C. R. Holden, Carl DeLong, E. A. Weston, Ferrill Hansen, and other agents, participated in and encouraged an organized movement among potato shippers, farmers and Granges to attack and villify the undersigned union, its affiliates and representatives, prevent employers from signing agreements with said union and discourage

membership in said union and interfere with and restrain its activities.

The Idaho Traffic Association has acted in the interest of and in behalf of the corporation and has acted and is acting in the interest of and on behalf of the partnership in labor relations and other matters, and is an employer within the meaning of Section 2, subsection (2) of the Act.

By the acts and statements above described and by other acts and statements the said employers interfered with, restrained and coerced and are interfering with, restraining and coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act and have violated and are violating Section 8 subsection (1) of the said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

Name and address of person or labor organization making the charge. (If made by a labor organization, give also the full name, local number and affiliation of organization, and name and official position of the person acting for the organization.)

TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND
HELPERS, LOCAL 983,
A.F.L.

By LEE W. OWEN,

Secretary-Treasurer, 140
South First Avenue, Pocatello, Idaho.

Subscribed and sworn to before me this 7th day
of October, 1942, at Pocatello, Idaho.

[Seal] MARIE V. HOLMES,
Notary Public residing at Po-
catello, Idaho.

My commission expires March 12, 1943.

BOARD'S EXHIBIT No. 1-L

United States of America
Before the National Labor Relations Board
Nineteenth Region

Case No. XIX-C-1116

In the Matter of

IDAHO FALLS POTATO GROWERS ASSO-
CIATION AND IDAHO TRAFFIC ASSO-
CIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1117

W. P. WILSON AND IDAHO TRAFFIC ASSO-
CIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1118

L. S. TAUBE, TED TAUBE, AND L. B. HOLDEN, CO-PARTNERS, DBA, L. S. TAUBE & COMPANY: AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1125

MEYER FRIEDMAN AND ARTHUR E. FRIEDMAN, CO-PARTNERS, DBA, S. FRIEDMAN & SONS AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1127

IDAHO FALLS WAREHOUSE COMPANY AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1129

ROWENAH O'NEIL, ADMINISTRATRIX OF
THE ESTATE OF J. E. O'NEIL, DE-
CEASED; AND IDAHO TRAFFIC ASSO-
CIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1131

A. G. STEWART AND IDAHO TRAFFIC AS-
SOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

Case No. XIX-C-1137

C. R. HOLDEN and L. L. HOLDEN, Co-Partners,
DBA HOLDEN BROTHERS, and IDAHO
TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F. L.

CONSOLIDATED COMPLAINT

It having been charged by Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, AFL, that Idaho Falls Potato Growers Association and Idaho Traffic Association; W. P. Wilson and Idaho

Traffic Association; L. S. Taube, Ted Taube, and Lloyd B. Holden, co-partners, doing business as L. S. Taube and Co., and Idaho Traffic Association; Meyer Friedman and Arthur Friedman, co-partners, doing business as S. Friedman & Sons, and Idaho Traffic Association; Idaho Falls Warehouse Company and Idaho Traffic Association; Rowenah O'Neil, Administratrix for the estate of J. E. O'Neil, deceased, and Idaho Traffic Association; A. G. Stewart and Idaho Traffic Association; and C. R. Holden and L. L. Holden, co-partners, doing business as Holden Brothers, and Idaho Traffic Association; hereinafter collectively referred to as the Respondents, have engaged in and are now engaged in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, hereinafter referred to as the Act, and an order having been made and entered by the National Labor Relations Board, hereinafter called the Board, consolidating said matters, the Board by its Regional Director for the Nineteenth Region as agent for the Board, designated by the Board's Rules and Regulations, Series 2, as amended, Article IV, Section 1, hereby issues its Consolidated Complaint and alleges the following:

I.

Idaho Falls Potato Growers Association, hereinafter referred to as "Respondent Potato Growers," is, and at all times since before January 1, 1942 has been, a co-operative association duly organized under and existing by virtue of the laws of the

State of Idaho. Respondent Potato Growers has its principal office at Idaho Falls, Idaho, and owns and operates warehouses or plants at Idaho Falls and Shelley, Idaho.

II.

W. P. Wilson, hereinafter referred to as "Respondent Wilson," is, and at all times since before January 1, 1942 has been, a private individual doing business under his own name. Respondent Wilson has his office, and owns and operates a warehouse or plant at Firth, Idaho.

III.

L. S. Taube, Ted Taube and L. B. Holden, hereinafter jointly referred to as "Respondent Taube," are, and at all times since before January 1, 1942, have been co-partners doing business under the trade name and style of L. S. Taube & Company. Respondent Taube has its principal office at Idaho Falls, Idaho, and owns and operates warehouses or plants at Idaho Falls and Shelley, Idaho.

IV.

Meyer Friedman and Arthur E. Friedman, hereinafter jointly referred to as "Respondent Friedman," are, and at all times since before January 1, 1942, have been co-partners doing business under the trade name and style of S. Friedman & Sons. Respondent Friedman has its principal office at Chicago, Illinois, and has an office and owns and operates a warehouse or plant at Idaho Falls, Idaho.

V.

Idaho Falls Warehouse Company, hereinafter referred to as "Respondent Warehouse Company," is, and since before January 1, 1942 has been, a corporation duly organized under and existing by virtue of the laws of the State of Idaho. Respondent Warehouse Company has its office, and owns and operates a warehouse or plant at Idaho Falls, Idaho.

VI.

At all times since before January 1, 1942 until on or about August 9, 1942, J. E. O'Neil was an individual doing business under his own name, who maintained an office and owned and operated a warehouse or plant at Idaho Falls, Idaho. On or about August 9, 1942 J. E. O'Neil died and thereafter Rowenah O'Neil was duly appointed and is now acting as administratrix of the estate of said J. E. O'Neil. J. E. O'Neil and Rowenah O'Neil, Administratrix of the estate of J. E. O'Neil, deceased, are hereinafter collectively referred to as the "Respondent O'Neil."

VII.

A. G. Stewart, hereinafter referred to as "Respondent Stewart," is, and at all times since before January 1, 1942 has been a private individual doing business under his own name. Respondent Stewart owns and operates a warehouse or plant at Shelley, Idaho.

VIII.

At all times since before January 1, 1942 until on or about June 30, 1942, Holden Brothers, Inc. hereinafter referred to as "Holden Corporation," was a corporation duly organized and existing by virtue of the laws of the State of Idaho, with its principal place of business at Idaho Falls, Idaho, where it owned and operated a plant or warehouse. At all times herein mentioned said Holden Corporation was owned, operated and managed by three individuals, including C. R. Holden and L. L. Holden. On or about June 30, 1942 Holden Corporation was dissolved. On or about June 30, 1942 the aforesaid C. R. Holden and L. L. Holden formed a partnership, and at all times since that date said C. R. Holden and L. L. Holden, as co-partners, have done and are now doing business under the firm name and style of Holden Brothers, and have owned and operated, and now own and operate the above mentioned plant or warehouse at Idaho Falls, Idaho as the successor to Holden Corporation. Holden Corporation, and C. R. Holden and L. L. Holden, co-partners, doing business as Holden Brothers, are hereinafter collectively referred to as "Respondent Holden."

IX.

Each of the respondents named in Paragraphs I to VIII inclusive, above, is and since before January 1, 1942 has been, engaged at the respective warehouses or plants mentioned in said paragraphs in the business of buying, sorting, packing, shipping and selling potatoes. Each of said Respon-

dents, in the course and conduct of said business operations, causes, and since before January 1, 1942 has continuously caused, a substantial amount of materials, principally burlap sacks, to be purchased, delivered and transported in interstate commerce from and through States of the United States other than the State of Idaho, to its plant or plants within the State of Idaho, and causes and has continuously caused a substantial amount of the potatoes handled by it to be sold and transported by it in interstate commerce to and through States of the United States other than the State of Idaho from its plant or plants in the State of Idaho.

X.

The Idaho Traffic Association, Inc., hereinafter referred to as "Respondent Traffic Association," is, and at all times since before January 1, 1942 has been, a corporation duly organized under and existing by virtue of the laws of the State of Idaho, having its office and place of business at Idaho Falls, Idaho. Respondent Traffic Association is, and at all times since its incorporation has been, an association of individuals, firms and corporations engaged in the buying, selling and shipping of potatoes and other produce. Each of the respondents named in paragraphs I to VIII inclusive, above, is, and since before January 1, 1942 has been, a member of the Respondent Traffic Association, or has participated in the affairs of or contributed financial support to Respondent Traffic Association. Respondent Traffic Association is, and at all times since its incorporation has been, engaged in

providing information, advice, and assistance to the above named respondents in connection with their marketing, traffic and labor relations problems, practices and policies, and acts and has acted in the interest of and on behalf of the above named respondents in dealings with labor organizations representing or purporting to represent the employees of said respondents with respect to matters of collective bargaining. Respondent Traffic Association is an employer within the meaning of Section 2, subsection (2) of the Act.

XI.

Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, AFL, hereinafter referred to as the "Union," is a labor organization within the meaning of Section 2, subsection (5) of the Act. The Union, a local unit of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, affiliated with the American Federation of Labor, hereinafter referred to as the "Teamsters Union," was chartered on or about January 16, 1942 by said Teamsters Union, and is the successor to Chauffeurs, Teamsters and Helpers, Locals 440 and 852 of the Teamsters Union, both of which were labor organizations within the meaning of Section 2, subsection (5) of the Act.

XII.

Respondents, and each of them, beginning with about January 23, 1942, instigated, or participated in and encouraged, an organized movement or concerted course of action carried on by Respondents'

representatives, by various units of the Idaho State Grange, and by other persons. Said movement or course of action was calculated to or had the effect of disrupting and defeating the attempts of employees of respondents named in paragraphs I to VIII inclusive, above, and of other employers at and in the vicinity of Idaho Falls, Shelley and Firth, Idaho, to join and assist the Union and to bargain collectively through the Union. As a part of said course of action Respondents have, among other things, taken the following action:

(1) Respondents, by and through Respondent Traffic Association and Carl DeLong, its executive secretary, and by and through various representatives of Respondents and members of the Respondent Traffic Association, whose names are well known to Respondents, did on or about January 24, 1942, cause a meeting to be held at Idaho Falls, Idaho of employees of Respondents and of other employers in the vicinity. At said meeting said Respondents, by Farrell Hansen and a number of farmers whose names are well known to Respondents, advised, urged and warned said employees not to join or remain members of the Union, but to form a committee or union not affiliated with the Teamsters Union, and threatened to discontinue the sorting of potatoes by their employees if said employees joined or remained members of the Union.

(2) Beginning with on about February 10, 1942, Respondents directly and through Respondent Traffic Association, Carl DeLong, and Eli A. Wes-

ton, attorney of all the Respondents, in conversations and meetings with Potato growers, farmers and representatives of various Granges, criticized and condemned the Union and the proposed collective bargaining agreements which had been presented to Respondents by the Union, and invited and encouraged said persons to assist them in opposing, defeating and disrupting the activities of the Union.

(3) As a direct result of the activities set forth in sub-paragraphs (1) and (2) above, various meetings of local Granges and farmers were held in the vicinity of Idaho Falls, Idaho, during the months of February and March of 1942. At said meetings, as a direct result of activities of Respondents, public statements were made and resolutions passed opposing the Union and its activities, and threatening a boycott of any employers who negotiated or signed agreements with the Union. The statements made and action taken at said meetings were publicized and given circulation among the employees of Respondents.

(4) On or about March 7, 1942 Respondents, by and through Eli A. Weston, their attorney, arranged a meeting of farmers and potato growers at Idaho Falls, Idaho, ostensibly for the purpose of permitting representatives of the Union to explain the program of the Union. At said meeting, in the presence of employees of Respondents, statements were made and resolutions offered and passed by representatives of the Respondents and persons acting on behalf of Respondents, which expressed

the opposition of Respondents to the membership of their employees in the Union and to collective bargaining by the Respondents with the Union, and which threatened loss of employment to said employees if they joined or remained members of the Union.

(5) During the months of February and March, 1942, and thereafter, Respondents made or caused to be made and published in newspapers having circulation among employees of Respondents, numerous public statements and press releases expressing the opposition of Respondents, Granges and farmers to membership of employees of Respondents in the Union and the effort of such employees to bargain collectively through the Union, and threatening such employees with loss of work and the disapproval of public opinion if such membership and effort were continued.

(6) Respondent Potato Growers, Respondent Wilson, Respondent Taube, Respondent Friedman, Respondent Warehouse Company, Respondent O'Neil, Respondent Stewart, Respondent Holden, beginning in January 1942, by and through officials, supervisory employees and agents, have by numerous statements to employees, urged and warned their employees not to join or remain members of the Union, and have discouraged membership in the Union.

XIII.

All employees of each of the respondents named in paragraphs I to II inclusive, above, employed on the cellar and warehouse crews at the respective

plants or warehouses named in said paragraphs, exclusive of office employees and supervisory employees of higher rank than cellar crew foremen, constitute, in the case of each of said respondents, a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subsection (b) of the Act.

XIV.

At all times since on or about February 10, 1942 the Union has been designated or selected as their representative for the purposes of collective bargaining by a majority of the employees in each of the collective bargaining units described in paragraph XIII above, and by virtue of Section 9, subsection (a) of the Act has been and now is the exclusive representative of all the employees in each of said units for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment.

XV.

At all times since on or about February 23, 1942 Respondent Potato Growers, Respondent Wilson, Respondent Taube, Respondent Friedman, Respondent Warehouse Company, Respondent O'Neil, Respondent Stewart, Respondent Holden and Respondent Traffic Association, acting in the interest and on behalf of said respondents, have jointly and severally failed and refused to recognize or bargain collectively with the Union as the exclusive representative of all the employees of respondents in the units described in Paragraph XIII above, in that;

(1) On and before February 16, 1942 the Union requested each of said respondents to bargain collectively in respect to rates of pay, wages, hours of employment, and other conditions of employment, with the Union as the exclusive representative of all the employees of said respondents in the units above described.

(2) Respondents have, as described above in Paragraph XII, attempted to disrupt the Union and discourage their employees from joining or remaining members of the Union.

(3) Respondents, jointly and severally, have at all times failed and refused to recognize the Union as the exclusive representative of their employees in the units described above in Paragraph XIII.

(4) Respondents, through their attorney, Eli A. Weston, have attempted to induce the Union to withdraw or abandon its requests for recognition and collective bargaining, have interjected into discussions and correspondence with Union representatives subjects and matters collateral or unrelated to collective bargaining; have stalled, delayed and avoided meetings of representatives of said Union; and have completely refused to engage in genuine collective bargaining with said Union in respect to wages, hours of employment and other conditions of employment.

XVI.

Respondent Potato Growers, on or about February 24, 1942, demoted Milo Rash to an inferior position and thereby forced said Milo Rash to quit his position with said Respondent, or on said date

discharged Milo Rash from its employ; and has at all times since said date refused to reinstate Milo Rash to his former position. Said action was taken by Respondent Potato Growers because of the membership and activities of the said Milo Rash in and on behalf of the Union.

XVII.

Respondent Taube, on or about February 5, 1942, discharged from its employ Mervin Crandall, Jack Hendrickson, Willard Moore, Harold Goodell, Clency Wadsworth and C. A. Falk, and since said date has at all times failed and refused to reemploy or reinstate the said employees. Said action was taken by the Respondent Taube because of the membership of said employees in the Union and their activities on behalf of the Union.

XVIII.

By the acts and statements described in Paragraphs XII, XIII, XIV and XV, Respondents, and each of them, have interfered with, restrained and coerced, and are interfering with, restraining and coercing their employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and have thereby engaged in and are thereby engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

XIX.

Respondents, by the acts alleged in Paragraphs XIII, XIV and XV herein, have engaged in and are engaging in unfair labor practices within the meaning of Section 8, subsection (5) of the Act.

XX.

Respondent Potato Growers and Respondent Taube, by the acts described in Paragraphs XVI and XVII, have discriminated and are discriminating in regard to the hire and tenure or terms and conditions of employment of the employees named in said paragraphs, and have engaged in and are engaging in unfair labor practices within the meaning of Section 8, subsection (3) of the Act.

XXI.

Respondent Potato Growers and Respondent Taube, by the acts alleged in Paragraphs XVI and XVII herein, have interfered with, restrained and coerced, and are interfering with, restraining and coercing their employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and did thereby engage in and are thereby engaging in unfair labor practices within the meaning of Section 8, subsection (1) of the Act.

XXII.

The activities of Respondents, and each of them, described above in Paragraphs XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX and XXI, occurring in connection with the operations of Respondents described above in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX, and X, have a close, intimate and substantial relation to trade, traffic and commerce among the several states, and tend to lead to labor disputes burdening and obstructing commerce, and the free flow thereof.

XXIII.

The acts of Respondents described above constitute unfair labor practices affecting commerce within the meaning of Section 8, subsections (1), (3) and (5) and Section 2, subsections (6) and (7) of the Act.

WHEREFORE, the National Labor Relations Board, on this 14th day of October, 1942, issues its Consolidated Complaint against Idaho Falls Potato Growers Association; W. P. Wilson, L. S. Taube, Ted Taube, and Lloyd B. Holden, co-partners, doing business as L. S. Taube and Co.; Meyer Friedman and Arthur Friedman, co-partners, doing business as S. Friedman & Sons; Idaho Falls Warehouse Company; Rowenah O'Neil, Administratrix for the estate of J. E. O'Neil; A. G. Stewart; C. R. Holden and L. L. Holden, co-partners, doing business as Holden Brothers; and Idaho Traffic Association; Respondents herein.

THOMAS P. GRAHAM, JR.

Regional Director

BOARD'S EXHIBIT NO. 1-L

[Title of Board and Causes.]

NOTICE OF HEARING

Please Take Notice that on the 2nd day of November, 1942 at ten o'clock in the forenoon in a court room in the Bonneville County Court House, Idaho Falls, Idaho, a hearing will be conducted be-

fore a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Consolidated Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

Copies of the amended charges upon which the consolidated complaint is based are attached hereto.

You are further notified that you have the right to file with the Regional Director for the Nineteenth Region, with offices at 812 Vance Building, Seattle, Washington, acting in this matter as agent of the National Labor Relations Board, an answer to the said consolidated complaint, within ten (10) days from the service thereof.

Please Take Notice that duplicates of all exhibits which are offered in evidence will be required unless, pursuant to request or motion, the Trial Examiner in the exercise of his discretion and for good cause shown, directs that a given exhibit need not be duplicated.

In Witness Whereof the National Labor Relations Board has caused this, its Consolidated Complaint and Notice of Hearing, to be signed by the Regional Director for the Nineteenth Region on this 14th day of October, 1942.

[Seal]

THOMAS P. GRAHAM, JR.

Regional Director National
Labor Relations Board

BOARD'S EXHIBIT NO. 1-N
AFFIDAVIT AS TO SERVICE

State of Washington

County of King—ss:

I, Gwen Alexander, being duly sworn, depose and say that I am an employee of the National Labor Relations Board, in the 19th Region at Seattle, Washington; on the 17th day of October, 1942, I served by postpaid registered mail, bearing Government frank, a copy of each of the following:

7 amended charges

1 second amended charge

Complaint (Consolidated)

Notice of Hearing

to the following named persons, addressed to them at the following addresses:

Idaho Falls Potato Growers Association, Idaho Falls, Idaho, Registry No. 243351

Idaho Traffic Association, Idaho Falls, Idaho, Registry No. 243352

S. Friedman & Sons, Idaho Falls, Idaho, Registry No. 243353

L. S. Taube & Company, Idaho Falls, Idaho, Registry No. 243354

A. G. Stewart, Shelley, Idaho, Registry No. 243355

Rowenah J. O'Neil, Idaho Falls, Idaho, Registry No. 243356

Idaho Falls Warehouse Company, Idaho Falls, Idaho, Registry No. 243357

Holden Brothers, Idaho Falls, Idaho, Registry No. 243358

W. P. Wilson, Firth, Idaho, Registry No. 243359

Eli A. Weston, Boise, Idaho, Registry No. 243360

Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A.F.L., Registry No. 243361

GWEN ALEXANDER

Junior Stenographer

Subscribed and sworn to before me this 21st day of October, 1942.

MAUDE SIPPLE

Designated Clerk

[Printer's Note: Return Card Receipts for above Registered Mail attached to this paper.]

BOARD'S EXHIBIT No. 1-P

[Title of Board and Cause.]

ANSWER

Come Now the Respondents in the Above-Entitled Cases and for Their Answer to the Above-Entitled Complaint Specifically Deny Each and Every Allegation, Matter, and Thing Contained Therein Not Hereinafter Admitted, Qualified or Explained.

I.

The Respondents object to the consolidation of the charges by the Union and deny that the Idaho Traffic Association has engaged in any activities collectively with reference to labor relations. That the problem of each Respondent is individual and without collective action and that there is, therefore, no reason or justification for a consolidated complaint.

II.

Respondents admit Paragraphs I, II, III, IV, V, VI, VII, VIII, and IX.

III.

The Respondent, Idaho Traffic Association, denies Paragraph X of the consolidated complaint and denies that it is an employer under the definition of Section 2 subsection (2) of the National Labor Relations Act and further denies that it has at any time been employed to advise or assist its members with reference to labor relations problems, practices, or policies. Nor has it at any time attempted to act for any of its members in dealing with labor organizations with respect to matters of collective bargaining or otherwise.

IV.

Respondents cannot answer Paragraph XI of the complaint inasmuch as the facts contained therein are without the knowledge of said Respondents.

V.

Respondents, and each of them, deny all of Paragraph XII of the complaint and in connection therewith state that they have been informed through an indirect source that said action may have taken place as a voluntary movement on the part of the farmers and others in the vicinity of Idaho Falls.

In denying subsection (4) of said Paragraph, Respondents allege that at the specific request of Lee W. Owen, Representative of the Union, a meeting was arranged for his benefit and for the purpose

of allowing him to influence the farmers and growers and to explain the Union's position with reference to negotiations. Respondents deny any knowledge of any resolutions which expressed opposition to any Respondents' employees joining the Union or loss of employment for so doing.

In denying subsection (5) of Paragraph XII the Respondents deny any knowledge of any public statements or releases or any threats of loss of work or disapproval of public opinion if employees continued as members of the Union.

Respondent potato growers Wilson, Taube, Friedman, Warehouse Company, O'Neil, Stewart and Holden specifically deny subsection (6) of Paragraph XII and deny they have ever warned their employees not to join or remain a member of the Union but on the contrary have always asserted and explained the employees' right to join any organization they desire without interference by these Respondents.

VI.

Respondents admit Paragraph XIII of the complaint but deny ever having received notification of appropriate unit for the purposes of collective bargaining or any information or proof that the Union represents 51 percent or any other percent of the employees of each of the Respondents.

VII.

Respondents deny Paragraph XIV of the complaint and deny that the Union is at the present time representative of a majority of the employees

of any Respondents' places of business and deny that the Union has been selected as the bargaining agent by a majority of said employees. That in connection with this denial Respondents urge that the present employees are the proper group to designate or select their bargaining agent—not the group employed on or about February 10, 1942.

VIII.

The Respondent, Potato Growers, deny all of Paragraph XV of the complaint both severally and jointly; and in connection therewith allege that although they have asked that the Union prove its right to bargain for Respondents' employees and to prove that it has a majority of said employees in the Union; and although the Respondents have insisted that these employees are "agricultural laborers," they have, nevertheless, met with and discussed terms of the contract with respect to rates of pay, wages, hours of employment and other conditions of employment.

Further answering said Paragraph XV the Respondents allege that the Union has refused to establish or prove that it represents a majority of the employees in any Respondents' establishments and still refuse to do so although request has been made for the same.

Respondents also deny subsection (2), (3) and (4) of Paragraph XV.

IX.

The Respondent, Idaho Falls Potato Growers, denies all of Paragraph XVI of the complaint and

denies that Milo Rash was demoted to an inferior position to induce him to quit his position, and in connection therewith alleges that said Milo Rash through incompetency, inefficiency and inability to handle his work was at his own request placed in a different position. Respondent denies that said Rash was discriminated against for membership in the Union or for any other reason whatsoever.

X.

Respondent, Taube, denies all of Paragraph XVII of the complaint and alleges with reference to the employees Mervin Crandall, Jack Hendrickson, Willard Moore Harold Goodell, Clency Wadsworth and C. A. Falk that said employees were laid off because of lack of work and that in picking out the employees to lay off, Respondent Taube took into consideration their ability, efficiency, willingness to cooperate and the length of service of each employee. That at no time did the Respondent discriminate against said employees because of Union activities or any other reason.

XI.

Respondents deny all of Paragraphs XVIII, XIX, XX, XXI, XXII, XXIII and the whole thereof.

XII.

Respondents, in addition to denying the allegations of the complaint and original charges deny in the same respect all amended charges filed in the above-entitled cases.

Wherefore Respondents and each of them ask that the complaint with Amendments be dismissed and that the Respondents be absolved of all charges and complaints by the Board or the Union.

Dated at Boise, Idaho, This 27th day of October, 1942.

E. A. WESTON

Their Attorney

Office Address: Sonna Building

Post Office Address: Box 1922
Boise, Idaho

IDAHO FALLS POTATO
GROWERS ASSOCIATION

By F. L. HANSEN

L. S. TAUBE, TED TAUBE,
AND L. B. HOLDEN, CO-
PARTNERS, DBA L. S.
TAUBE & COMPANY

By L. B. HOLDEN

IDAHO FALLS WAREHOUSE
COMPANY

By A. S. MEYER

ROWENAH O'NEIL, ADMIN-
ISTRATRIX OF THE ES-
TATE OF J. E. O'NEIL, DE-
CEASED

By ROWENNAH O'NEIL

C. R. HOLDEN AND L. L.
HOLDEN, CO-PARTNERS,
DBA HOLDEN BROTHERS

By C. R. HOLDEN

W. P. WILSON

By W. P. WILSON

MEYER FRIEDMAN AND AR-
THUR E. FRIEDMAN CO-
PARTNERS, DBA S. FRIED-
MAN & SONS

By GEO. D. PETERS

A. G. STEWART

By A. G. STUART

IDAHO TRAFFIC ASSOCIA-
TION

By [Illegible.]

The above subscribed and sworn to before me this
28th day of October, 1942 at Idaho Falls, Idaho

[Seal] F. C. SIMONSON

Notary Public, Residing at Idaho Falls, Idaho

My commission expires 5/22/44 19...

Personal Service of the within Answer admitted
this 29th day of October 1942.

NATIONAL LABOR RELA-
TIONS BOARD

By WM. A. BABCOCK, JR.

Regional Attorney

Due & Personal Service of the within Answer ad-
mitted at Idaho Falls this 29th day of October 1942

LOCAL 982 A. F. L.

By LEE W. OWENS

Sec. & Treas.

United States of America
Before The National Labor Relations Board

Case No. C-2489

In the Matter of

IDAHO POTATO GROWERS, INC. and IDAHO
TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

Case No. C-2490

In the Matter of

W. P. WILSON and IDAHO TRAFFIC ASSO-
CIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

Case No. C-2491

In the Matter of

L. S. TAUBE, TED TAUBE, AND L. B. HOLD-
EN, Co-partners, d/b/a L. S. TAUBE & COM-
PANY and IDAHO TRAFFIC ASSOCIA-
TION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

Case No. C-2492

In the Matter of

MEYER FRIEDMAN AND ARTHUR E.
FRIEDMAN, Co-partners, d/b/a S. FRIED-
MAN & SONS, and IDAHO TRAFFIC AS-
SOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

Case No. C-2493

In the Matter of

IDAHO FALLS WAREHOUSE COMPANY and
IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

Case No. C-2494

In the Matter of

ROWENAH O'NEIL, ADMINISTRATRIX OF
THE ESTATE OF J. E. O'NEIL, DE-
CEASED, and IDAHO TRAFFIC ASSO-
CIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

Case No. C-2495

In the Matter of

A. G. STUART and IDAHO TRAFFIC ASSO-
CIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

Case No. C-2496

In the Matter of

C. R. HOLDEN AND L. L. HOLDEN, Co-part-
ners, d/b/a HOLDEN BROTHERS and
IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A.F.L.

DECISION AND ORDER

On January 9, 1943, the Trial Examiner issued his Intermediate Report in the above-entitled proceedings, finding that the respondents had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and that they take certain affirmative action, as set forth in the copy of the Intermediate Report annexed hereto. Thereafter, the respondents filed exceptions to the Intermediate Report and a brief in support of their exceptions. The Union

has not excepted to the findings and recommendations of the Trial Examiner. The Board has considered the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed.

Upon request of the respondents and pursuant to notice, a hearing was held before the Board in Washington, D. C., on March 16, 1943, for the purpose of oral argument. The respondents and the Union were represented by counsel and participated in the hearing.

The Board has considered the Intermediate Report, the exceptions and brief filed by the respondents, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner with the following exception.

The Trial Examiner has found that the employees of the respondent Potato Growers on its cellar and warehouse crews at Idaho Falls and Shelley, of the respondent Taube on its cellar and warehouse crews at Idaho Falls and Shelley, of the respondent Wilson on his cellar and warehouse crews at Firth, of the respondent Stuart on his cellar and warehouse crews at Shelley, and of each of the other respondent dealers on the cellar and warehouse crews at Idaho Falls, exclusive of office employees and supervisory employees of higher rank than cellar crew foreman, constitute in the case of each of said respondents a separate unit appropriate for the purposes of collective bargaining. The evidence indicates, however, that in the case of at least one of

the respondents, cellar crew foremen have the power to hire and discharge members of their crews. We shall therefore exclude such cellar crew foremen from the appropriate units. We accordingly find that at all times material herein the employees of the respondent Potato Growers on its cellar and warehouse crews at Idaho Falls and Shelley, of the respondent Taube on its cellar and warehouse crews at Idaho Falls and Shelley, of the respondent Wilson and his cellar and warehouse crews at Firth, of the respondent Stuart on his cellar and warehouse crews at Shelley, and of each of the other respondent dealers on the cellar and warehouse crews at Idaho Falls, exclusive of office employees, cellar crew foremen having the power to hire and discharge, and supervisory employees of higher rank than cellar crew foremen, constituted, and that they now constitute, in the case of each of said respondents, a separate unit appropriate for the purposes of collective bargaining, within the meaning of Section 9 (b) of the Act.¹

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations

¹The parties stipulated at the hearing that a majority of the employees in each of the units found to be appropriate had, in or about February 1942, designated the Union as their collective bargaining representative. So far as the record shows, exclusion from the appropriate units of the comparatively small number of cellar crew foremen having the power to hire and discharge will not affect the Union's representative status.

Act, the National Labor Relations Board hereby orders that:

1. The respondents, Idaho Potato Growers, Inc.; W. P. Wilson, L. S. Taube, Ted Taube, and L. B. Holden, co-partners doing business as L. S. Taube & Company; Meyer Friedman and Arthur E. Friedman, co-partners doing business as S. Friedman & Sons; Idaho Falls Warehouse Company; Rowenah O'Neil, administratrix of the Estate of J. E. O'Neil, deceased; A. J. Stuart; C. R. Holden and L. L. Holden, co-partners doing business as Holden Brothers; and Idaho Traffic Association, when acting as agent for or in the interest of any of the other respondents; and their respective officers, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Refusing to bargain collectively with Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, as the exclusive representative of the employees of the respondent dealers in each of the units found above to be appropriate for the purposes of collective bargaining;

(2) In any other manner interfering with, restraining, or coercing the employees of the respondent dealers in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Upon request, bargain collectively with Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, as the exclusive representative of all the employees of the respondent dealers in each of the units found above to be appropriate with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(2) Post immediately in conspicuous places in the respective warehouses of the respondent dealers in Idaho Falls, Firth, and Shelley, and in the place of business of the Idaho Traffic Association in Idaho Falls, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to employees of the respondent dealers stating that the respondents will not engage in the conduct from which they are ordered to cease and desist in paragraphs 1, a, (1) and (2) of this Order, and that they will take the affirmative action set forth in paragraph 1, b, (1) of this Order;

(3) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps they have taken to comply herewith.

2. The respondents L. S. Taube, Ted Taube, and L. B. Holden, co-partners doing business as L. S. Taube & Company, and their agents, successors, and assigns, shall, in addition:

a. Cease and desist from discouraging membership in Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, or in any other labor organization of their employees, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment.

b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act.

(1) Make whole Willard Moore for any loss of pay he has suffered by reason of the discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of the discrimination against him to the date on which he obtained his present employment, less his net earnings during such period;

(2) Insert in the notice which they are directed to post in paragraph 1, b, (2) of this Order the statement that they will not engage in the conduct from which they are ordered to cease and desist in paragraph 2, a, of this Order; that they will take the affirmative action set forth in paragraph 2, b, (1) of this Order; that their employees are free to become and remain members of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor; and that they will not discriminate against any em-

ployee because of membership in or activity on behalf of that organization;

3. The respondent Idaho Potato Growers, Inc., and its officers, agents, successors, and assigns, shall, in addition:

a. Cease and desist from discouraging membership in Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment.

b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Make whole Milo Rash for any loss of pay he has suffered by reason of the discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of the discrimination against him to the date on which his wife obtained her present civil service employment, less his net earnings during such period;

(2) Insert in the notice which it is directed to post in paragraph 1, b, (2) of this Order the statement that it will not engage in the conduct from which it is ordered to cease and desist in paragraph 3, a, of this Order; that it will take the affirmative action set forth in paragraph 3, b, (1) of

this Order; that its employees are free to become and remain members of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor; and that it will not discriminate against any employee because of membership in or activity on behalf of that organization.

And It Is Further Ordered that the complaint be, and it hereby is, dismissed, insofar as it alleges that the respondents L. S. Taube, Ted Taube, and L. B. Holden, co-partners doing business as L. S. Taube & Company, discriminated in regard to the hire and tenure of employment of Jack C. Hendricksen, C. A. Falk, Clency L. Wadsworth, Marvin Crandall, and Harold Goodell.

Signed at Washington, D. C., this 10th day of April 1943.

HARRY A. MILLIS

Chairman

GERARD D. REILLY

Member

JOHN M. HOUSTON

Member

NATIONAL LABOR RELATIONS BOARD

[Title of Board and Cause.]

MR. WILLIAM A. BABCOCK, JR., and
MR. LOUIS S. PENFIELD,

for the Board.

MR. E. A. WESTON, of Boise, Idaho,

for the respondents.

MR. LEE OWEN, of Pocatello, Idaho,

for the Union.

INTERMEDIATE REPORT

Statement of the Case

Upon charges duly filed by Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, affiliated with the American Federation of Labor, herein called the Union, the National Labor Relations Board, herein called the Board, by its Regional Director for the Nineteenth Region (Seattle, Washington), issued its complaint dated October 14, 1942, against Idaho Potato Growers, Inc., herein called Potato Growers; W. P. Wilson, herein called Wilson; L. S. Taube, Ted Taube, and L. B. Holden, co-partners, doing business as L. S. Taube & Company, herein called Taube; Meyer Friedman and Arthur E. Friedman, co-partners, doing business as S. Friedman & Sons, herein called Friedman; Idaho Falls Warehouse Company, herein called Warehouse Company; Rowenah O'Neil, administratrix of the estate of J. E. O'Neil, deceased, both this administratrix and business predecessor being at times

referred to herein as the respondent O'Neil;² A. G. Stuart, herein called Stuart; C. R. Holden and L. L. Holden, co-partners, doing business as Holden Brothers, both this respondent and its predecessor firm Holden Brothers, Inc., being at times referred to as the respondent Holden; and Idaho Traffic Association, herein called Traffic Association.³ The complaint alleged that the respondents had engaged in and were engaging in unfair labor practices within the meaning of Section 8 (1) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act, and that the respondents Potato Growers and Taube had each also engaged in and were engaging in un-

²Although J. E. O'Neil and Holden Brothers, Inc., are not parties respondent to these proceedings, at times in this Report they, as business predecessors to the respondents Rowenah O'Neil, administratrix of the estate of J. E. O'Neil, and L. S. Taube, Ted Taube, and L. B. Holden, co-partners, doing business as L. S. Taube & Company, respectively, for purposes of convenience only are included when reference is made collectively to "the respondents" and to "The respondent dealers." Whether the terms refer to the business predecessor depends in each instance on the time the respondents O'Neil and Holden began business operations as business successors of J. E. O'Neil and Holden Brothers, Inc., respectively. The extent to which J. E. O'Neil and Holden Brothers, Inc., are responsible for the unfair labor practices is discussed in Section V *infra*.

³The first eight named respondents represent eight different cases, Idaho Traffic Association being also named as a party respondent in each of these cases. By a corrected order dated September 30, 1942, these cases were consolidated.

fair practices within the meaning of Section 8 (3) and Section 2 (6) and (7) of the National Labor Relations Act, 49 Stat. 449, herein called the Act, and that the respondents Potato Growers and Taube had each also engaged in and were engaging in unfair labor practices within the meaning of Section 8 (3) and Section 2 (6) and (7) of the Act. Copies of the complaint, accompanied by notice of hearing, were duly served upon each of the respondents and the Union.

With respect to the unfair Labor practices the complaint as amended at the hearing alleged in substance: (1) that the respondents by and through the respondent Traffic Association and its executive secretary and others did on or about January 24, 1942, cause a meeting to be held at Idaho Falls, Idaho, of employees of the respondents Potato Growers, Wilson, Taube, Friedman, Warehouse Company, O'Neil, Stuart, and Holden, and the respondents and a number of farmers well known to them advised, urged, and warned said employees not to join or remain members of the Union; but to form an unaffiliated committee or union, and threatened to discontinue work of the employees if they joined or remained union members; (2) that on or about February 10, 1942, and thereafter, the respondents directly and through the respondent Traffic Association, its executive secretary, and a named attorney for the respondents in conversations and meetings with farmers and Grange representatives condemned the Union and collective bargaining contracts presented by it to the respondents and encouraged said persons to assist in opposing the

Union; (3) that as a result of these activities of the respondents various local Grange and farmers' meetings were held during February and March 1942 at which statements were made and resolutions passed in opposition to the Union and threats made to boycott dealers who entered into agreements with the Union, said activities being publicized and circulated among employees of the respondents; (4) that on or about March 7, 1942, the respondents arranged a meeting of farmers and potato dealers, ostensibly for the purpose of allowing union representatives to explain the program of the Union, at which time statements were made and resolutions passed in opposition to membership of the respondents' employees in the Union and to collective bargaining with the Union, and threats were made to employees that there would be loss of work if they joined or remained members of the Union; (5) that in February and March 1942, and thereafter, the respondents made or caused to be made and published in newspapers circulated among the employees statements and press releases expressing opposition of the respondents, farmers, and Granges to employee membership in the Union and to the attempts at collective bargaining, threatening loss of work and disapproval of public opinion if such membership and attempts were continued; (6) that the respective respondents Potato Growers, Wilson, Taube, Friedman, Warehouse Company, O'Neil, Stuart and Holden, beginning in January 1942, have urged and warned their employees to refrain from union membership; (7) that the respondents jointly and severally have failed and refused by

specified acts to bargain collectively with the Union, as representative of the respective respondents' employees in appropriate units, although the Union at said times represented employees of each of the respondents in the appropriate units; (8) that the respondent Potato Growers on or about February 24, 1942, demoted a named employee to an inferior position and forced him to quit his employment, or discharged and refused to reinstate him because of his membership in and activities on behalf of the Union; (9) that the respondent Taube on or about February 5, 1942, discharged and refused to reinstate six named employees because of their membership in and activities on behalf of the Union.

The respondents, prior to the hearing, filed an answer in which they denied the commission of any unfair labor practices. The respondents also amended their answer at the hearing, alleging in the amendment that the units set forth in the complaint with respect to the respondents Potato Growers and Taube were not appropriate.

Pursuant to notice, a hearing was held at Idaho Falls, Idaho, from November 2 to 10, 1942, before the undersigned, the Trial Examiner duly designated by the Acting Chief Trial Examiner. The Board and the respondent were represented by counsel and the Union by its representative. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded all parties. The respondents moved during the hearing for a dismissal of the complaint with respect to the Traffic Association, on the ground that it was not an employer

within the meaning of the Act. They also moved for a dismissal of the complaint both in part and in its entirety on various grounds.⁴ Ruling on these motions was reserved. Except as otherwise hereinafter indicated they are denied. At the close of the hearing motions were made to amend the pleadings to conform to the proof with respect to names and similar matters. There was no objection and the motions were granted. Also at the close of the hearing counsel for the Board and the respondents argued orally before the undersigned. The opportunity of filing briefs with the undersigned was likewise afforded, but only counsel for the Board has availed himself of the privilege.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The business of the respondents

All of the respondents except the Traffic Associa-

⁴The grounds urged included the contention that the employees involved were engaged in agriculture and for such reason the Board did not have jurisdiction; that the consolidation of the cases was improper and prejudicial; that the Board had never determined whether the Union was the employees' collective bargaining representative; and that the Board had no jurisdiction over the respondents Holden, O'Neil and Friedman. Regarding Holden and O'Neil it was contended that they could not properly be held accountable for the unfair labor practices of their business predecessors. Regarding Friedman it was urged that no business operations had taken place during the current season.

tion, being herein at times called the respondent dealers, are dealers in potatoes in Idaho Falls, Idaho, and vicinity. The respondent dealers except the Potato Growers customarily buy lots of potatoes from other dealers and farmers in the vicinity, and pack, load, ship, and re-sell them. The respondent Potato Growers, being a cooperative enterprise, does not buy the potatoes in which it deals but ships them for the account of farmers, both members and non-members, and of other dealers with all of whom it ordinarily makes final settlement at the end of the season. All of the respondent dealers maintain warehouses and employ country crews in the Snake River Valley in the vicinity of Idaho Falls, Idaho. The specific operations of each are particularized below.

The respondents L. S. Taube, Ted Taube, and L. B. Holden, doing business as L. S. Taube & Company, are a copartnership with their principal office in Kansas City, Missouri. This firm maintains warehouses for the handling of potatoes at both Idaho Falls and Shelley, Idaho. It buys potatoes in the vicinity of these warehouses from both growers and dealers and re-sells them. During the 1941-42 season it sold and shipped from its Idaho Falls and Shelley warehouses approximately 1000 carloads of potatoes, more than 90 percent of which were shipped to points outside the State of Idaho.

The respondent W. P. Wilson maintains a warehouse for the handling of potatoes at Firth, Idaho. Between 10 and 15 percent of the potatoes handled by him during the 1941-42 season consisted of pota-

atoes grown by himself, the remainder of the potatoes handled by him during that period consisting of potatoes bought by him from other dealers and growers and re-sold by him. He sold and shipped from his Firth plant during the 1941-42 season approximately 450 carloads of potatoes, about 90 percent of which were shipped to points outside the State of Idaho.

Meyer and Friedman and Arthur E. Friedman are co-partners, doing business as Friedman & Sons. This firm, whose main office is in Chicago, Illinois, leases and operates a warehouse at Idaho Falls for the handling of potatoes. It is generally engaged in the produce business in various States. In the course of its Idaho Falls operations it purchases potatoes from growers and other dealers. During the 1941-42 season it sold and shipped from its Idaho Falls warehouse approximately 360 carloads of potatoes, about 90 percent of which were sold and shipped to points outside the State of Idaho.

Idaho Falls Warehouse Company, an Idaho Corporation, among various business enterprises conducted by it at Idaho Falls, maintains a warehouse for the handling of potatoes. This respondent not only buys potatoes from growers and dealers for re-sale, but also at times acts as an agent in the handling of potatoes for growers. About 65 to 85 percent of the potatoes handled by it during the 1941-42 season were purchased by it for re-sale. During that season this respondent shipped approximately 700 carloads of potatoes, about 90 percent of which were sold and shipped to points outside the State.

Idaho Potato Growers, Inc., is a non-profit co-operative association, incorporated under the laws of the State of Idaho. This respondent sorts, packs, ships and sells potatoes for both its members and other growers. It also at times markets in carload lots potatoes acquired from other dealers. It carries on a substantial portion of its operations in the vicinity of Idaho Falls and Shelley, Idaho, and maintains a warehouse at each of these places.

Its method of handling potatoes is to find a buyer who offers to purchase potatoes at a stipulated sum and then by oral agreement with the grower or dealer to dispose of his potatoes to the buyer at the offered price less expenses incurred by the Potato Growers in the course sorting, packing and handling them. At the end of the season this respondent makes settlement with the growers and dealers whose potatoes it has handled during the season. During the 1941-42 season the Potato Growers shipped approximately 1300⁵ carloads of potatoes in the course of its operations in these vicinities. About 95 percent of these potatoes were shipped to points outside the State of Idaho. Some of the potatoes handled by this respondent during the 1941-42 season were sold to the United States Army.

Rowenah O'Neil is the duly appointed and acting administratrix of the estate of J. E. O'Neil, de-

⁵This respondent shipped during the 1941-42 season a total of about 2500 carloads of potatoes in the course of its operations throughout the State of Idaho. Its manager testified that slightly more than half of these were from the Idaho Falls and Shelley operations.

ceased. As administratrix she carries on the business of J. E. O'Neil in substantially the same manner as it was conducted by the latter before his death in August 1942.

O'Neil before his death and Rowenah O'Neil, administratrix, since that time have maintained a warehouse in Idaho Falls for the handling of potatoes. During the 1941-42 season he bought 800 to 900 carloads of potatoes from growers and other dealers, of which more than 90 percent was shipped and sold outside the State of Idaho.

A. G. Stuart owns and operates a warehouse at Shelley, Idaho. He handles in the course of his operations at Shelley potatoes grown by both himself and other growers. During the 1941-42 season about 95 percent of the potatoes handled by him was bought from other growers. During the season 1941-42 he sold and shipped approximately 200 carloads of potatoes, about 95 percent of which was sold and shipped to points outside the State of Idaho.

C. R. Holden and L. L. Holden, doing business as Holden Brothers, are a co-partnership. This firm, which came into existence in July 1942, owns and operates a warehouse at Idaho Falls where it handles potatoes and operates a general produce business. At the time this partnership was organized it acquired this property in Idaho Falls from Holden Brothers, Inc., an Idaho Corporation, which was liquidated in June 1942. C. R. Holden, L. L. Holden, and an individual in New York were the sole stockholders in this corporation, which op-

erated a produce business both in New York and in Idaho Falls. During the 1941-42 season this corporation sold 739 cars of potatoes acquired from growers, 610 of these cars being sent to points outside the State of Idaho. The corporation sold 129 carloads on the tracks at Idaho Falls for cash and the buyers sent most of the cars so purchased to points outside the State of Idaho. The Holdens operated the corporation's Idaho business and at or about the time of the liquidating of the corporation acquired the Idaho interests of the third stockholder. Since that time the co-partnership as described above has operated the same type of business as was conducted at Idaho Falls by the corporation.

Idaho Traffic Association is an Idaho corporation with its office at Idaho Falls. This corporation was organized in September 1941 for the purpose of rendering aid and assistance to shippers with respect "to traffic problems of all kinds, and matters arising out of the preparation, inspection, sale and shipment of merchandise and commodities of whatsoever nature." It has no stockholders, but issues memberships instead of stock. All the respondent dealers and about seven other potato dealers and shippers in the vicinity of Idaho Falls hold such memberships. For some time since prior to 1942 the Association has sponsored a luncheon meeting each Monday in Idaho Falls. Representatives of the member companies and some others have attended these meetings. Carl DeLong, executive secretary of the respondent Traffic Association, has

usually presided at these meetings. Early in 1942 after the Union became active in Idaho Falls and asked the respondents and certain other potato dealers and shippers to bargain collectively with it as representative of their respective employees, as described more fully below, Eli Weston, counsel for the respondents, received an invitation to attend one of these meetings. He did so and the respondents and others present voted to retain him to represent them in labor negotiations. He later received a fee paid by a check of the Traffic Association.⁶

II. The employees

As set forth above, the respondent dealers handle potatoes which they acquire from farmers and other dealers. The employees who sort and pack potatoes for each of these respondents in the process of preparing them for market, except when performing certain odd jobs in the warehouses,⁷ work in crews. The work done by the crews of each of these respondents is substantially the same. A crew, consisting of about eight employees, works at a sorter machine run by electric power. The employees on a crew usually consist of four employees known as

⁶Most of the respondents made a contribution to the Association for this purpose. At least one of them, however, appears to have paid its portion of the fee direct to Attorney Weston. See footnote 26, *infra*.

⁷The work of Milo Rash discussed *infra* is an example of such an odd job. Carloading and packing potatoes for special types of shipment are other examples of such work.

sorters, one as a scooper, one as a jigger, one as a swamper, and one as a sack sewer.

After a dealer has agreed with a grower to buy or handle the latter's potatoes it is necessary to sort the potatoes according to grade and pack them for shipment. This work is performed either in the dealer's warehouse or in the grower's cellar by one of these crews which works at the sorter machine where it grades, weighs and sacks the potatoes. Most of such work as is done in the various warehouses of the respondent dealers takes place during a rush period of a few weeks in the fall of the year. Throughout the season considerable of such work is done in the growers' cellars. Approximately 90 percent of the potatoes handled by some of the respondent dealers are graded and packed in the country. If the work is done in the country it is necessary for either the farmer or the dealer to truck the potatoes to the dealer's warehouse or direct to railroad cars. If it is done in the dealer's warehouse the potatoes are then loaded on cars at the warehouse for shipment.

At times the potatoes are only partially sorted in the grower's cellar. In such instance, they are not graded and all of the culls are not removed, so there has to be a further sorting at the dealer's warehouse. At times also the potatoes are of such a quality that it is necessary for the respondent dealers to wash them at the warehouse before they will pass government inspection.

The respondents contend that the employees who sort and prepare the potatoes for shipment in the

growers' cellars and the dealers' warehouses on the crews described above are engaged in agriculture and that the Act does not give the Board jurisdiction over these employees.⁸ These crews, whether working in a farmer's cellar or in a dealer's warehouse, are under the supervision of the warehouse foreman. When working in a farmer's cellar they are under the immediate direction of a crew foreman who is also known as head sorter man. When work is to be done in a farmer's cellar a complete crew is usually sent by the dealer from the warehouse. At times, however, the dealer does not send a complete crew because the farmer himself works as a member of the crew and at times also has one or more farm hands work as members of the crew. Usually the dealer pays the wages of the crew members sent to the country by him, although on occasions the farmer pays them for the work done in his cellar. Except for the unusual cases when the farmer pays the crew, the dealer deducts from the sales price paid the farmer for the potatoes the amount paid the crew as wages in sorting and packing the potatoes.

The farmer at times is dissatisfied with the job of sorting being done by the crew and in such cases customarily registers his complaint with the crew foreman whether the complaint is directed to individuals on the crew or to the crew as a whole.

⁸Section 2 (3) of the Act excludes "Agricultural labor" from the term "employee" as therein defined and consequently from the jurisdiction of the Board as confined by the Act.

Occasionally after a farmer registers his complaint the crew is stopped from working until a representative of the respondent dealer comes to the cellar and adjusts the complaint. There is no evidence that any member of a crew has ever been discharged because a farmer complained about the crew member's work. The authority to hire and discharge crew members finally rests with the foreman or managers of the respective respondent's warehouses, although crew foremen of country crews frequently are allowed to select their own crews. When the potato season begins each fall the respondent dealers customarily rehire upon application satisfactory crew members who have previously worked for them.

From the facts as detailed above it is obvious that the warehouse and cellar crews are employees of the respective respondent dealers. They work under supervisors designated by the dealer. They work either in the dealer's warehouse or in the cellar of growers with whom the dealer has made arrangements to buy or dispose of potatoes. The farmers and farm hands furnished by them to "fill in" on crews are not involved in this case, but only such employees as are carried on the respective respondent dealers' payrolls. The undersigned is convinced that these employees are not agricultural laborers within the meaning of the Act. The services of these employees are not rendered in the fields. Their work looks not toward the production of potatoes but toward their marketing. Their services are devoted entirely to the sorting of

potatoes, and their grading, weighing, sacking, preparation for shipment, and loading. The work is of such a nature that it can be done in the dealer's warehouse as well as in the farmer's cellar. The undersigned finds that the cellar and warehouse crews employed by the respondent dealers are not employed as agricultural laborers.⁹

III. The organization involved

Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, is a labor organization affiliated with the American Federation of Labor. It admits to membership employees of the respondent dealers.

IV. The unfair labor practices

A. Opposition to the Union during its attempt to

⁹Matter of Upland Citrus Association and Citrus Packing House Workers' Union No. 20915, 24 N.L.R.B. 1136; North Whittier Heights Citrus Association v. N.L.R.B. 109 F. (2d) 76 (C.C.A. 9), cert. denied 310 U.S. 632, rehearing denied 311 U.S. 724, enf'g Matter of North Whittier Heights Citrus Association and Citrus Packing House Workers Union, Local No. 21091, 10 N.L.R.B. 1296; Matter of American Fruit Growers, Inc., et al and Fruit & Vegetable Workers Sub-Local of No. 191, UCAPAWA, C.I.O., 10 N.L.R.B. 316; Matter of George G. Averill, et al, and Fresh Fruit & Vegetable Workers Union, Local 78, C.I.O., 13 N.L.R.B. 411; Matter of Grower-Shipper Vegetable Association of Central California, et al, and Fruit and Vegetable Workers' Union of California, No. 18211, 15 N.L.R.B. 322, modified in other respects by N.L.R.B. v. Grower-Shipper Vegetable Ass'n 122 F. (2d) 368 (C.C.A. 9). Cf. Matter of Stark Brothers Nurseries and Orchards Company, a corporation, and Local Industrial Union No. 1129, affiliated with the C.I.O., 40 N.L.R.B. 1243.

organize the potato workers; interference, restraint and coercion

In August 1941 Jack C. Hendricksen, an employee of the respondent Taube, had a conversation with Keyes Blair, "an executive of the Carpenters' Union."¹⁰ Blair suggested to Hendricksen that some of the employees of potato dealers attend a meeting of meat cutters and grocery clerks. Hendricksen and three other such employees attended such a meeting. Blair on that occasion explained to these employees how to start a labor organization. Two or three weeks later one Rosquist, an American Federation of Labor executive, called at Hendricksen's home and suggested to Hendricksen that petitions be circulated among those employees interested in forming a labor organization. Hendricksen, C. A. Falk and another employee of the respondent Taube caused such petitions to be circulated among employees of that respondent and also among employees of the respondents Potato Growers, Holden, and the Warehouse Company. In January 1942 Raymond L. Hansen, an organizer for the "Joint Council of Teamsters," came to Idaho Falls and began to organize the creamery workers in the vicinity. Hendricksen and Falk, another employee of the respondent Taube, called on Hansen while he was in Idaho Falls and turned over to him some

¹⁰This testimony apparently refers to United Brotherhood of Carpenters and Joiners of America, affiliated with the American Federation of Labor.

of the petitions which had been circulated among the potato growers. Hansen told these two employees that arrangements would be made for a meeting of the potato workers on January 16. An organizational meeting was held at that time.

News that the Union was organizing these workers soon spread among the respondent dealers and other dealers and also among the farmers in the vicinity of Idaho Falls. About January 20, after Milo Rash, an employee in the warehouse of the Potato Growers, had signed an application for membership in the Union, Fred Foreman, who had supervision over employees in the Idaho Falls warehouse of the Potato Growers, called Rash into the foreman's office. Rash's uncontradicted testimony, which the undersigned credits, was that Foreman asked him "what all this union business was about," saying that "several people of the different dealers" had telephoned that Rash was the instigator of it. Moreover, according to the uncontradicted testimony of Swen Sorman, an employee of J. E. O'Neil at the time, in about January 1942 O'Neil's foreman, Lloyd Johnson, in the presence of Sorman and other O'Neil employees at the O'Neil warehouse in Idaho Falls, stated that O'Neil and several others had retained an attorney who was "going to break the Union so the Union would never go through." This testimony is credited by the undersigned.

Thereafter, on the evening of January 23, 1942, Farrel L. Hansen, manager, Fred Gustafson, secretary treasurer, and E. S. Trask, a director of the Potato Growers, C. R. Holden, L. B. Holden, J. E.

O'Neil, Carl DeLong, A. G. Stanger, manager of the Warehouse Company, and about 50 other persons, mostly farmers interested in the growing of potatoes, held a meeting in a hotel in Idaho Falls, to discuss the matter of the Union's drive to organize the potato workers. The farmers expressed concern over any possible increase in the wages of potato workers and asked the dealers present the nature of the employees' complaint. It was decided that a committee of farmers be appointed to invite a representative of employees from each potato dealer's warehouse to attend a meeting with the farmers next day at the Idaho Falls City Hall and discuss settlement of the difficulty. It was understood by those present that this discussion was to be for the purpose of attempting to adjust differences without the intervention of an "outside union." It does not appear from the evidence whether or how the committee issued invitations to the meeting to be held next day. All of the respondent dealers, however, asked certain of their employees to attend this meeting. Before the meeting on the afternoon of January 24, Manager Hansen of the Potato Growers told Ernest Norell and one or two other employees of that respondent about the meeting and said he wanted them to be present. About the same time Rash asked Foreman if he should attend the meeting to be held that afternoon. Foreman said, "Yes, I want you to go." Foreman also told Rash that he would be paid for time spent at the meeting. About noon the day of the meeting Warren Coon, buyer for the respondent Taube, went to a cellar in the

country where a crew of that respondent's employees were at work. He announced the meeting to be held that afternoon at the City Hall and gave instructions that two members of the crew were to attend. He stated that wages would be paid as usual to those who attended. The crew selected two of its members, Willard Moore and Jack Hendricksen, to attend. Rash, Moore, Hendricksen and the other respondent dealers' employees who attended this meeting were paid for their time so spent.

The meeting at the City Hall was attended by 60 to 70 people. Employees from dealers operating in the Idaho Falls, Shelley, and Firth areas, including employees of all the warehouses affected by this proceeding, attended the meeting. George Hersley, a farmer, presided at the meeting¹¹ and informed those present of the fact that he and four other farmers who were present had been selected as a committee to talk to the employees and propose that they form a union of their own. He stated that "the carpenters and the laborers and everybody else" in the Pocatello area, which was near Idaho Falls, "had made a racket of labor unions and he sure didn't want that same condition to come to Idaho Falls." He said there was no need of letting their money get out of the State when they could keep it at home. He introduced one West. West stated that the community had always gotten along all right until "these God damned racketeers and

¹¹Hersley also had acted as chairman of the January 23 meeting.

agitators came in here" and caused trouble. Manager Hansen and Secretary-Treasurer Gustafson¹² of the Potato Growers were both present at the meeting and spoke. Hansen stated, among other things, that the employees at the Potato Growers had always been one happy family until the Union had started trouble. Organizer Hansen testified that on this occasion Gustafson stated that a few years previous he and Manager Hansen had succeeded in getting the State legislature to enact a so-called "potato sorting bill"; that this bill caused an increase in employment for people who worked in sorting and packing potatoes; and that Gustafson and Manager Hansen would return to the legislature and obtain repeal of this law "unless conditions changed." Neither Gustafson nor Manager Hansen specifically denied this testimony of Organizer Hansen and the undersigned credits his testimony as stated above.¹³

¹²Gustafson was also one of the farmers on the committee referred to by Hersley, chairman of the meeting.

¹³Organizer Hansen also testified that Gustafson stated he would gladly spend time in jail for the opportunity to "run a pitchfork" through Hansen's "God damn guts." This testimony was vehemently denied by Gustafson. Manager Hansen and other respondents' witnesses testified that Gustafson made no mention of attacking Organizer Hansen with a pitchfork. Manager Hansen and Gustafson testified that the legislation they had sponsored was adverted to by Gustafson as indicating their pro-labor attitude, but the other witnesses for the respondents failed to controvert Organizer Hansen's version of Gustafson's threat involving this legis-

It is obvious from the facts detailed above that the meeting of January 24, 1942, was not an attempt by the respondent dealers to enable the Union to reach an understanding with the farmers. On the contrary the purpose of the meeting, as stated when it was planned, was to settle labor difficulties by methods which would defeat the Union. Manager Hansen and Secretary-Treasurer Gustafson further gave their support to these activities by the statements made at the meeting. They, Trask, C. R. and L. B. Holden, J. E. O'Neil and Carl DeLong further lent their assistance by helping plan the meeting. The respondents Potato Growers, Taube, and Warehouse Company lent assistance by asking certain of their employees to attend.

The undersigned finds that by the remarks of Foreman to Rash as detailed above; by the conduct of Manager Hansen, Secretary-Treasurer Gustafson and Director Trask, L. B. Holden, and Manager Stanger in helping plan the meeting of January 24; by the speeches of Hansen and Gustafson at the meeting; and by the acts of the respondents Potato Growers, Taube, and Warehouse Company in asking certain of their employees to attend the meeting knowing its anti-union purpose, the respondents Potato Growers, Taube, and Warehouse Company interfered with, restrained, and coerced their employees in the exercise of the rights guaranteed in

lation. Under the circumstances, the undersigned finds that although Gustafson threatened repeal of the "potato sorting bill," he did not speak of assaulting Organizer Hansen with a pitchfork.

Section 7 of the Act. The effect of the conduct of C. R. Holden, J. E. O'Neil, Lloyd Johnson, and Carl DeLong will be discussed hereinafter.¹⁴

B. The cases of discrimination

1. The discrimination of the respondent
Taube against Moore.

The complaint alleges that on February 5, 1942, the respondent Taube, terminated the employment of Willard Moore, Jack C. Hendricksen, Clency L. Wadsworth, C. A. Falk, Mervin Crandall and Harold Goodell because of their membership in and activity on behalf of the Union. The respondent Taube denies that these employment terminations were for union membership and activity, but contends that in making them it singled out those employees who were least capable. A total of eleven lay-offs were made at the time and the evidence shows that a decline in business necessitated such a number of lay-offs. The question is whether the six employees named above were singled out for inclusion among those to be laid off because of their union membership and activity.

Carl Metcalf, foreman of the respondent Taube's Idaho Falls warehouse, after conferring with L. B. Holden, prepared a list of those to be laid off on February 5. According to Holden, he told Metcalf at the time to keep efficient men on the job. Metcalf's attitude toward the Union is shown by the

¹⁴See Section V *infra*.

uncontradicted testimony of Wadsworth,¹⁵ which the undersigned credits, about a remark made by Metcalf in the presence of Wadsworth and other employees a week to ten days before these employment terminations. On that occasion Metcalf said regarding the Union, "Now that you belong to the God damned Union do you feel any better about it?" L. B. Holden's participation in the meeting of January 23, which was designed to thwart the Union, has been discussed above.

Willard Moore, one of those whose employment Metcalf terminated on this occasion, began work for the respondent Taube in the fall of 1936. He worked for it every season thereafter until February 5, 1942, except for one voluntary lay-off from February until December 1941. Moore attended the Union's organizational meeting on January 16 and joined the Union. He attended and spoke at the meeting at the City Hall on January 24. Hersley, chairman of the meeting, stated that the Union would take money out of the State, and Moore answered this contention by stating that his experience as a member of a labor organization on the coast showed that "this condition did not exist." Moore also stated on this occasion that it should be possible for the Union and the dealers to come to an agreement which would improve the conditions of the employees "without hurting the dealer very much."

On the afternoon of February 5 after the eleven employees mentioned above had returned to the

¹⁵Wadsworth at times worked in the country and when doing so was crew foreman.

warehouse from work in the country, Metcalf told Moore and the others that he had orders from the office to lay them off. On the same crew with Moore was Hyrum Beck, a sorter hand. Beck had worked for the respondent Taube only since the spring of 1941. Also on the same crew were Cleo Teats, Milton Aller, and Dave Mahoney. Teats, a scooper, was working his first season for the respondent Taube; Aller, a jigger, and Mahoney, a cull picker,¹⁶ were working only their second season. Moore, who at the time was a cull picker, had also had experience at other types of sorting and also as a scooper and jigger.

The respondent Taube contends that it had no policy as to seniority and for that reason did not give weight to seniority in making these lay-offs. However, during the month of December 1941 before the advent of the Union this respondent similarly found it necessary to make eight lay-offs. All of those laid off at that time were working their first season at this respondent's Idaho Falls warehouse. Moreover, prior to the December lay-offs Metcalf conferred with Clifford Moore, a country crew foreman, as to what members of his crew should be laid off. Moore recommended that an employee on his crew who was working his first season be laid off. In February, however, Metcalf did not confer with Moore regarding the lay-offs to be made, although three employees from Moore's crew were at the time

¹⁶A cull picker is a type of sorter.

laid off, more than from any other crew. One of them was Willard Moore.¹⁷

L. B. Holden, testifying as to why Moore was laid off, stated that he was one of the youngest men on the crew,¹⁸ and "a little slow on the table, possibly." Metcalf, who had supervision over the warehouse and country crews of the respondent Taube, was not called as a witness. Clifford Moore, Willard Moore's crew foreman, described the latter as a "good man in the crew." Metcalf did not consult with Foreman Moore during the 1941-42 season about the quality of work of Willard Moore. He visited the cellars where this crew worked during the season only three or four times and remained only 15 to 30 minutes on these occasions. Moreover, at the time of the lay-offs Moore and Hendricksen, discussed below, asked Metcalf if their work was satisfactory and Metcalf replied affirmatively. All the circumstances detailed above, when studied in connection with Holden and Metcalf's animus toward the Union, raise the question whether the respondent Taube terminated the employment of Moore because of his union membership and activity. L. B. Holden's activities to thwart the Union and Metcalf's remark made prior to these lay-offs in opposition to

¹⁷The other members of Clifford Moore's crew to be laid off were Hendricksen, whose case is discussed below, and Jim Singleton, who is not named in the complaint.

¹⁸Holden apparently referred to Moore's service during the 1941-42 potato season, as Moore had worked for this respondent since the fall of 1936.

the Union have been stated above. Soon after the lay-offs the Union sought execution on behalf of its members of collective bargaining contracts with the various respondent dealers under circumstances detailed below. Metcalf about that time further signified his animosity toward the Union by stating to a group of employees while at work that he didn't "think very damned much of the Union." Metcalf referred to the collective bargaining contracts as outrageous and stated that "anybody who signed a contract like that would be a damned fool." Of 48 employees in the respondent Taube's Idaho Falls warehouse at the time of the February lay-offs all but five were members of the Union and all eleven of those laid off were Union members. The undersigned is convinced that Moore would not have been included in the group except by reason of his pronounced activity as a member of the Union. L. B. Holden testified that he never undertook to ascertain which employees were members of the Union, although he understood practically all of the Taube employees were members. The undersigned is convinced and finds, however, that in view of the nature of Moore's union activity the respondent Taube had knowledge of it.

The undersigned finds that in terminating the employment of Willard Moore on February 5, 1942, the respondent Taube discriminated in regard to his hire and tenure of employment and discouraged membership in a labor organization; that by such discrimination said respondent interfered with, restrained, and coerced its employees in the exercise

of the rights guaranteed them by Section 7 of the Act.

2. The alleged discrimination of the respondent Taube against Hendricksen, Wadsworth, Falk, Goodell, and Crandall

Hendricksen, one of those whose employment the respondent Taube terminated, began work for this respondent in the fall of 1937 and except for the season of 1938-39 worked for Taube each season thereafter until his lay-off in February 1942. During the preceding August, he had conceived the idea of forming a union among the potato workers and had made inquiry as to how this could be done. He helped circulate petitions among those employees signifying their desire to organize and met with Organizer Hansen soon after this individual came to Idaho Falls. Hendricksen attended the Union's organizational meeting on January 16. He spoke at the meeting of January 16, urging the other employees to join. He also joined the Union about that time. He attended the meeting of January 24 at the City Hall and spoke, although the record is silent as to the nature of his remarks at that meeting.

On the afternoon of February 5 Metcalf notified Hendricksen of his lay-off. Hendricksen worked in the same crew with Willard Moore, discussed above, and had seniority over Beck, Teats, Aller, and Mahoney, and although a sorter at the time of his employment termination, was experienced in the types of work being done by these employees. L. B. Holden, in testifying as to why Hendricksen was in-

cluded among those to be laid off, stated that Hendricksen was a little older and slower than the other employees. He testified also that he "understood" in cases where the warehouse "changed from the small packs to hundred pound bags" or the other way Hendricksen would spend too much time counting sacks rather than cleaning the floor and getting ready to pack according to the changed size of the bags. Although Clifford Moore, Hendricksen's crew foreman, described the latter as a steady man who did good work, and Metcalf told him on February 5 that his work had been satisfactory, the undersigned, while viewing Hendricksen's employment termination with suspicion, is not convinced under all the circumstances that the respondent Taube singled him out to be laid off because of his Union membership and activity. His activity on behalf of the Union was somewhat pronounced, but the evidence does not show that the respondent Taube had knowledge of it.¹⁹

The undersigned finds that in laying off Hendricksen on February 5, 1942, the respondent Taube did not discriminate in regard to his hire and tenure of employment.

¹⁹Although Hendricksen spoke at the meeting on January 24, as did Moore, the record does not disclose the content of his remarks. When testifying at the hearing Hendricksen was asked what he said on that occasion, and he stated that he could not remember. It is therefore not clear whether the remarks he made on that occasion revealed that he was a supporter of the Union.

Wadsworth began working regularly for the respondent Taube in the fall of 1938. About the second season of his employment Wadsworth was foreman of a country crew. Thereafter until his employment termination on February 5, 1942, he worked most of the time in the warehouse as a sorter and grader. During the 1941-42 season he was head grader on one of the crews operating in the warehouse. Wadsworth attended the organizational meeting of the Union on January 16 and at that time signed an application for membership. He thereafter talked in favor of the Union to other employees with whom he worked. On February 5 only one sorter was operating in the respondent Taube's warehouse. That was the machine on which Wadsworth was head grader. At the close of work that day Metcalf told Wadsworth he was on the list of those to be laid off. Since Wadsworth began to work regularly for this respondent he had never previous to this occasion been laid off before the end of the season. After Wadsworth's lay-off Pete Schultz²⁰ a head grader of less experience than Wadsworth, continued working. Schultz, however, was also a member of the Union. Moreover, there is no evidence to show that the respondent had knowledge that Wadsworth was more active in the Union than Schultz. The explanation given by the respondent Taube for Wadsworth's lay-off was in L. B. Holden's testimony that growers sometimes complained that Wadsworth unnecessarily clipped

²⁰Erroneously mentioned in the transcript as Pete Schuetz.

off the ends of potatoes and that he always verified the correctness of his pay check. Although Wadsworth's testimony shows that none of his superiors had ever considered these matters of sufficient importance to discuss them with him prior to his employment termination, the undersigned is not convinced that Union affiliation and activity rather than the reasons given by this respondent were the real causes of Wadsworth's employment termination.

The undersigned finds that in laying off Wadsworth on February 5, 1942, the respondent Taube did not discriminate in regard to his hire and tenure of employment.

Falk²¹ began work for the respondent Taube in the fall of 1936. He worked most of the time as a jigger and was so employed at the time of the February 1942 lay-offs. Falk was one of the employees who assisted Hendricksen circulate the petitions mentioned above among employees interested in forming a labor organization. He joined the Union. He also attended and spoke at the Union organizational meeting on January 16. He assisted Organizer Hansen distribute pamphlets among the potato workers. Falk was selected by the Union as a member of a committee to prepare the proposed contracts mentioned above for presentation to the respondent dealers. He attended the meeting at the City Hall on January 24. Falk was one of those laid off on February 5. Holden testified that Falk

²¹Although this employee was not present to testify at the hearing, the facts as detailed below about his case were elicited from other witnesses.

was laid off because, among other reasons, he used intoxicants. He related no specific instances of Falk's using intoxicants and testified on cross-examination that his knowledge of the subject was limited to hearsay. Holden testified also that Falk was slower and older than some of the other employees.²² Aller, mentioned above, another jigger of less experience than Falk, was not included among those laid off. Aller, however, was also a member of the Union and the evidence does not show that the respondent Taube knew Falk's union activity to be more pronounced than that of Aller.

Although Wadsworth who had on occasions acted as country crew foreman over Falk, testified that Falk's work was satisfactory,²³ and Falk's work had apparently never been criticized before his lay-off, the undersigned is not convinced under all the circumstances that Falk's employment was terminated for union membership and activity.

The undersigned finds that in terminating the employment of Falk on February 5, 1942, the respondent Taube did not discriminate in regard to his hire and tenure of employment.

Goodell, a carloader in the respondent Taube's

²²Holden's explanation of this reason for Falk's lay-off was as follows: "The only thing I recall is, —would be his ability to handle the front end of the machine, and also he was very slow in helping clean up, and things like that, around the machine."

²³Willard Moore, who at times had worked with Falk, also testified that he regarded Falk as a good worker.

warehouse, had worked for this respondent since 1937. He attended and spoke at the Union's organizational meeting on January 16, and attended the meeting at the City Hall on January 24. He also helped distribute Union literature. He was absent from Idaho Falls and did not appear as a witness at the hearing, and evidence as to some of the circumstances surrounding his lay-off is somewhat meager. Holden testified Metcalf had reported to him that Goodell did not follow instructions in loading cars and was laid off for that reason. The evidence fails to show that the respondent Taube had knowledge of Goodell's Union activity. Nor does it show that he was experienced at other types of work than that of carloader or that any carloaders employed by this respondent a shorter period of time than Goodell were retained on the payroll after his lay-off. On the basis of the evidence the undersigned is not convinced that his lay-off was discriminatory.

The undersigned finds that in laying off Goodell on February 5, 1942, the respondent Taube did not discriminate in regard to his hire and tenure of employment.

Crandall, a sack sewer, had worked for the respondent Taube about three seasons at the time of his lay-off. He joined the Union, advocated it to other employees at the time it was organizing them, attended the Union meeting on January 16, and was one of those selected to attend the meeting on January 24. Crandall, like Goodell, did not appear as a witness at the hearing. Holden indicated that

Crandall was laid off because he did not "get along" with the other employees and growers. In support of this contention Holden referred to a conversation between himself and another dealer about some "trouble" the latter had with Crandall. The respondent Taube also elicited some testimony from other witnesses, apparently intended to show that Crandall before his lay-off had some difficulty with a farmer named Hanson while the crew of which Crandall was a member was working at Hanson's farm. Although this evidence regarding the respondent Taube's reasons for laying off Crandall is somewhat unsatisfactory and testimony adduced by the Board showed that the "argument" between Crandall and Hanson may not have been as serious as this respondent contended, the undersigned is not convinced that he was discriminatorily laid off. Although this employee was somewhat active on behalf of the Union, the evidence fails to show that the respondent Taube had knowledge of this activity. The undersigned finds that in laying off Crandall on February 5, 1942, the respondent Taube did not discriminate in regard to his hire and tenure of employment.

3. The discrimination of the respondent
Potato Growers against Rash

The complaint alleges that Rash was discriminatorily demoted and forced to quit his position or discharged on February 24, 1942. Rash began work for the Potato Growers in 1938. He did not return to work during the 1939-40 season, but returned in

the fall of 1940 and worked until the date of the alleged discrimination. During his first season of employment Rash did sorting and miscellaneous work in the Idaho Falls warehouse. During the 1940-41 season he worked mostly on sorting crews both in the warehouse and in the country. At the close of the season in 1941, Manager Hansen sent for Rash and told him in the former's office that he was grateful for the work done by Rash during the season and he hoped Rash would return the following season as he would need him more at that time. In September 1941 Rash returned to work. It was the practice of the respondent Potato Growers to ship potatoes in bags known as brand bags and to use field bags, or dump bags, in the country as a temporary means of packing potatoes that had to be "re-run" in the warehouse. Soon after Rash began his employment in September 1941 Foreman assigned him the work of looking after these bags. This work did not require all his time, however, and when he was not busy looking after the bags Rash did other work such as helping the car-loader and packing bags and boxes of potatoes. Part of the time Rash was under the direct supervision of Foreman and at other times Lester Long, a foreman in charge of certain packing work in the warehouse, supervised his work.

Rash attended the Union's organizational meeting on January 16 and immediately became active on its behalf. Foreman's interrogation of Rash soon thereafter about "this union business" and his statement to Rash that some of the dealers had said he

was "the instigator of the whole business" has been detailed above. Foreman thereafter told Rash to attend the meeting at the City Hall on January 24 as detailed above. Rash was also elected a member of the Union's contract committee.

Between February 10 and 16, 1942, Owen sent separate letters to the various respondent dealers in which he requested meetings on behalf of the Union with these respondents for the purpose of negotiating collective bargaining contracts. A copy of a proposed contract was enclosed in each of these letters. The letter to the respondent Potato Growers and a copy of the proposed contract was sent to it on or about February 13. Soon after receipt of this letter and the proposed contract Manager Hansen called a meeting at this respondent's Idaho Falls warehouse of all employees at both its Idaho Falls and Shelley operations. Both Hansen and Fred Foreman, the supervisor of the Idaho Falls warehouse employees, attended this meeting. Hansen spoke, suggesting to the employees that they would "get lots further lots quicker" by forming a labor organization of their own than by belonging to the Union. Rash stated in reply to Hansen that he did not think an organization of their own would give them as much power or support as affiliation with an international organization. Hansen stated, however, that he did not believe the employees would need such affiliation and said that if they would take up their problems with him and the Board of Directors he believed they could get whatever they wanted. He suggested that they take up their prob-

lems through a grievance committee. An election by written ballot was then held for members of such a committee in the presence of Hansen and Foreman. Rash and two other employees were elected to this committee, Rash being elected its chairman by receiving the most votes.

Thereafter on February 24, Foreman entered the "sack room" where Rash was at work and, although that date was not the end of a pay period, gave Rash his pay. Foreman said to Rash on this occasion, "Well, I guess that is all of it . . . They have decided to discontinue your job. . . . The dumpers will put the sacks into the sack room and the truck drivers will take them out to the country crews."²⁴ Foreman told Rash that the latter might be able to get work on a country crew. Rash protested that if he did so he would be unable to do scooping.

Soon after these events Manager Hansen told Organizer Hansen that Rash was not discharged, but was temporarily laid off and he would like to talk to Rash. Rash then called on Manager Hansen when Hansen was attending a meeting of the Traffic Association at a hotel in Idaho Falls. Hansen said to Rash on that occasion that he thought Rash was misled by the Union, but that he did not discharge him for union activities. Hansen said he

²⁴It is noteworthy that Manager Hansen himself had created the position of looking after the sacks before Rash was assigned to it. It is clear as discussed below, that the position was not permanently abolished at the time of Rash's employment termination.

would take up with the Potato Growers' board of directors the matter of putting Rash back to work in the warehouse and would let Rash know later. Hansen did not, however, offer Rash a position.

After Rash's employment termination Victor Mussman, a warehouse employee, was assigned to the work of handling the sacks. Mussman had begun work for the respondent Potato Growers only the preceding fall. Joe Schofield, another warehouse employee, at the same time was assigned to help look after the sacks. After about 2 days Lester J. Long, a foreman in the warehouse, was told by Foreman to take over the sack job, as the sacks were getting into such a state of confusion from improper handling that there might be trouble. Long accordingly transferred from other work in the warehouse to that of handling the sacks. Long still performs this work. The work consumes about two-thirds of his time.

Late in February or early in March after Rash's employment termination Manager Hansen called a meeting of the respondent Potato Growers' employees in the Idaho Falls warehouse for discussion of whether it should allow the dealer O'Neill to use part of the Potato Growers' warehouse for carrying on certain operations.²⁵ Rash asked Hansen if he should attend this meeting as chairman of the grievance committee. Hansen told Rash there was

²⁵There had been a fire at the O'Neil warehouse and the discussion was whether that dealer should be given use of part of the Potato Growers' warehouse during the emergency.

no need of his presence, but that it would be all right if he wished to attend. Rash attended the meeting and asked Hansen before its conclusion whether he was discharged. Hansen testified that Rash indicated on this occasion after inquiring as to his status that there were certain jobs he would not take; that Hansen asked if Rash thought himself "better than any of these other boys," and indicated the necessity of working with reduced force; that Rash then said, "I feel sorry for you, in fact, I feel so sorry I think I will pass the hat right now to get some money to help you out;" and that after this remark Hansen told Rash that in view of his attitude he had better look for other work. Rash did not deny this testimony by Hansen. The undersigned credits it.

As Rash's employment had already been terminated at the time of the remark about "passing the hat" for Hansen's benefit, it is obvious that he was not discharged for having made this remark. Hansen stated on cross examination an inability to recollect ever having offered Rash any specific job after his employment termination. Ernest Norell, a foreman of one of the respondent Potato Growers' country crews, testified that he told Rash after his lay-off that the latter could work on Norell's country crew and that Rash could have had work on the crew "if he wanted to scoop." Rash denied that Norell offered him a job. In any event Foreman, who was Norell's superior, told Norell about that time to have Rash do "scooping or something" if he went on the crew. Whether Norell offered Rash a

job on the latter's country crew is not free from doubt. It is clear, however, that if he did so the offer was confined to a scooping job.

Hansen testified that before Rash's employment termination he told Foreman to attempt, on account of decreased business, to reduce the pay roll and combine operations. He testified that he suggested Long as being able to do Rash's work.

The undersigned is impressed by the fact, however, that there were no other lay-offs of the respondent Potato Growers' employees on February 24, 1942. This fact and the transfer of Long about two days later to Rash's position, indicates a desire by this respondent to sever Rash from its employment rather than to eliminate his position and "cut down" its force. Foreman's instructions to Norell to have Rash do scooping work indicates a similar desire. The evidence shows that scooping was a "heavy job" and required "bending" for substantially all the time that an employee was so engaged. Moreover, since scooping paid 5 cents an hour less than Rash's former position, which was still continued as part of the operations of the respondent Potato Growers, Rash was not offered substantially equivalent employment.

Hansen testified that Foreman may have held a different attitude toward Rash than himself because about the time of Rash's employment termination there was some confusion in packing for shipment some potatoes of a customer named Wood. This customer furnished his own bags for the pack-

ing of his potatoes. According to Hansen, Rash failed to have these bags available to be filled with potatoes at the time loading of the car for shipment was begun. As a result, part of the potatoes had to be unloaded and re-packed for shipment. Hansen testified that at the time he blamed Foreman and Foreman blamed Rash for this mistake. Foreman did not mention the above incident at the time he gave Rash his pay check on February 24. Since he did not testify at the hearing there is no evidence directly to indicate that he wanted to terminate Rash's employment because of the carloading incident mentioned by Hensen. Any such conclusion would be speculation. Moreover, at the time of Rash's employment termination on February 24 the reason given by Foreman for such action was that Rash's position was being eliminated.

Under all the circumstances the undersigned finds that on February 24, 1942, the respondent Potato Growers discriminated in regard to the hire and tenure of employment of Rash and discouraged membership in a labor organization; that by such discrimination said respondent interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

C. The refusals to bargain; other interference, restraint, and coercion

1. The arrangement of the respondent and other dealers to handle their labor problems through the Traffic Association.

Meanwhile, after the letters and proposed con-

tracts mentioned above had been mailed to the respondent and other dealers on behalf of the Union, Manager Hansen and Eugene Trask, a director of the Potato Growers, asked Eli Weston, an attorney at Boise, Idaho, to come to Idaho Falls in order to discuss with the potato dealers their labor problems. On February 16, 1942, Attorney Weston attended a meeting sponsored by the Traffic Association in Idaho Falls. The respondents and other dealers who were present, voted to retain Weston and to contribute to a fund for his payment. The voted contributions were made accordingly, most of them being deposited with funds of the Traffic Association and paid Weston by De Long, its executive secretary.²⁶

2. The appropriate units

The complaint alleges that all employees of the respondent Potato Growers on its cellar and warehouse crews at Idaho Falls and Shelley, of the respondent Taube on its cellar and warehouse crews at Idaho Falls and Shelley, of the respondent Wilson on his cellar and warehouse crews at Firth, and of the respondent Stuart on his cellar and warehouse crews at Shelley, and of all the other respondent dealers on their respective cellar and

²⁶Although a stipulation made at the hearing recited that the contributions were thus paid through the Traffic Association, the stipulation reserved to the parties the right to introduce evidence as to Traffic Association matters. There was testimony that the respondent Taube paid Weston its portion of the fee direct.

warehouse crews at Idaho Falls exclusive of office employees and supervisory employees of higher rank than cellar crew foreman, constitute, in the case of each of said respondents, a unit appropriate for the Purposes of collective bargaining within the meaning of Section 9(b) of the Act. The answer, as amended at the hearing, admits the appropriateness of the units as alleged except with respect to the respondents Potato Growers and Taube.

The Idaho Falls and Shelley warehouses of each of these respondents are under separate supervisors. The supervisor of each of these warehouses, however, is responsible to a manager who has an office in the plant at Idaho Falls, which is about 8 miles from Shelley. The Shelley foreman of each, as a practice telephones "his" manager in Idaho Falls repeatedly every day about business matters at the Shelley warehouse. The general nature of the work performed by the warehouse and cellar crews at Idaho Falls and Shelley is the same. Occasionally, employees are exchanged between the warehouses of each of these respondents in the two places. That Manager Hansen viewed the employees of the respondent Potato Growers at Idaho Falls and Shelley as one group with common interests as to matters of labor organization is shown as set forth above by the fact that in February 1942, he called to one meeting employees of both the Idaho Falls and Shelley warehouses of that respondent at which he urged them to start a union of their own. The Union has members in both the

Idaho Falls and Shelley warehouses of these respondents.²⁷ It is the only labor organization, moreover, which has members among the employees in any of these warehouses.

The undersigned finds that at all times material herein the employees of the respondent Potato Growers on its cellar and warehouse crews at Idaho Falls and Shelley, of the respondent Taube on its cellar and warehouse crews at Idaho Falls and Shelley, of the respondent Wilson on his cellar and warehouse crews at Firth, and of the respondent Stuart on his cellar and warehouse crews at Shelley, and of all the other respondent dealers on their respective cellar and warehouse crews at Idaho Falls, exclusive of office employees and supervisory employees of higher rank than cellar crew foreman, constitute and constituted in the case of each of said respondents a unit appropriate for the purposes of collective bargaining, and that said units insure to the employees of each of said respondents the full benefit of their rights to self-organization and to collective bargaining and otherwise effectuates the policies of the Act.

3. Representation by the Union of a majority
in the appropriate units.

It was stipulated at the hearing that the Union had been designated as representative for the purposes of collective bargaining of a majority of the

²⁷The Union has as members a majority of the employees in the combined Idaho Falls and Shelley plants of each of these employees, but not in the Shelley plants alone.

employees on pay rolls of the respective respondent dealers in or about February 1942²⁸ in each of the units found to be appropriate.

The undersigned finds that in or about February 1942, and at all times material thereafter, the Union was designated and selected by a majority of the employees of the respondent dealers in the units found to be appropriate and pursuant to Section 9 (a) of the Act, was at that time and at all times material thereafter, and now is the exclusive representative of the employees in each of said units for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

4. The refusals to bargain

Important in the vicinity of Idaho Falls is the Grange, a well known farmers' organization. The Grange members and other farmers were concerned about the attempt to unionize the potato workers because, they contended, labor costs are ultimately paid by the farmer. Soon after the proposed contracts were sent to the respondent and various other dealers on behalf of the Union as stated above, a meeting of so-called local Grange masters and others took place in a hotel in Idaho Falls. Manager Hansen and Director Trask of the respondent Potato Growers attended this meeting.

²⁸The pay rolls referred to in the stipulation were as of the approximate dates the proposed contracts were sent the various respondent dealers. They covered various periods during the month of February.

Attorney Weston was also present. It was agreed on this occasion to hold "a general growers meeting" in order to explain the proposed Union contracts and the developments with respect to unionization of the potato workers. Such a meeting took place on February 23, 1942, in York Grange Hall, a meeting place near Idaho Falls. Weston was present and explained the nature of the contracts presented the dealers. Some statistics prepared by Manager Hansen regarding how the Union contracts would increase labor costs were read at the meeting. The group voted a resolution which recited, among other things, that those present at the meeting protested the entering into any contracts between dealers and the Union unless the farmers in the vicinity were allowed to participate in the negotiations; also that the farmers should be represented and allowed to present evidence in case the matter went before the Board. Those at the meeting further passed a motion unanimously "that all growers and producers in this area refuse to ship or send potatoes or produce to any packer or shipper who signs the contracts discussed at the meeting."

Several other similar meetings of the Grange and other organizations were held in the vicinity soon after the York Grange meeting. Manager Hansen testified that he attended and spoke at several of these meetings and that he attempted at such times to organize the growers so that they could "put themselves in position to properly represent their interests in the case of cases where any costs of

wages were under consideration that would affect the prices they receive for their potatoes." Hansen's activities encouraged farmer opposition to the Union. On March 2, 1942, Organizer Hansen, Owen, and others representing the Union, met with Weston, representing the respondent dealers. Weston mentioned the York Grange meeting and the other meetings being held by the Grange as showing the attitude of the farmers. He stated that in order to negotiate, it would be necessary for the Union "to recognize" the Grange. A similar meeting was again held the next day, Manager Hansen also attending this meeting. Weston and Manager Hansen reiterated the position taken by Weston the preceding day. Manager Hansen also said that he did not see why the Union undertook to organize the community's potato workers, as the community was devoted to agriculture and was getting along "very good" without the Union. Owen stated at this meeting that he would like to talk to the farmers, as he understood they had an erroneous idea of the Union's contract demands. Weston and Manager Hansen stated that they thought they could arrange such a meeting and the former agreed to invite those who were to attend.

On March 7, 1942, the proposed meeting was held, attended by 60 to 70 persons. Weston presided and several of the respondent dealers were represented at this meeting. A number of the employees were there. Owen spoke, undertaking to state the purposes of the Union and the nature of the proposed contracts. Several growers also spoke at this meet-

ing. J. E. O'Neil spoke, stating to Owen in the presence of the group, " * * * what in the Hell have you ever done for your country; why in the Hell don't you get a gun on your back instead of causing trouble on others, * * *" Manager Hansen also spoke, stating that the Potato Growers' sorting costs had risen from eight to fifteen cents a hundred because of lack of interest of his employees since union activity began. The meeting finally broke up during an argument between Owen and O'Neil. The farmers and dealers, however, remained for further discussion after the meeting.

On Sunday, March 8, 1942, Weston wrote a letter to Owen, stating that the dealers²⁹ were perhaps in a worse predicament than before the meeting of March 7. He stated that he planned to attend the regular meeting of the dealers³⁰ the next day, however, when a decision would be made as to "the farmer matter." Weston stated that he would advise Owen as to progress made at that meeting. Meanwhile on March 4, Owen wrote the respondent Wilson reminding him of the proposed contract previously mailed, stating that under the Act it was a duty to negotiate within a reasonable time with a union which represented 51 per cent or more employees, and asking him his position with refer-

²⁹In his letter Weston referred to the group as "the potato packers." Whether he intended to include in the category other dealers besides the respondent dealers is not clear.

³⁰Apparently Weston had reference to the Traffic Association's weekly meeting.

ence to negotiating. Wilson replied that the dealers as a group had turned the matter over to Weston and he understood that Weston was in communication with Organizer Hansen. On March 10, Owen sent letters like that sent Wilson to the other respondent dealers. On Monday, March 16, Weston wrote Owen that he had been unable to attend the dealers' meeting³¹ that day in Idaho Falls, although he had expected to do so. Weston stated that he favored considering the various contracts individually and that, although he had understood that upon failure of Owen to convince the farmers at the "last meeting" the dealers were to be for the time relieved of negotiating, he would communicate with Owen as soon as he heard from the dealers about further negotiations. Weston indicated that there were three or four dealers with respect to whom he questioned the Union's majority, and he would later submit the names of those dealers to Owen.³² No such names were ever submitted.

On March 18, Organizer Hansen and Owen had another meeting with Weston. Weston suggested that since he was located at Boise, Idaho, negotiations be conducted by mail. Hansen and Owen refused to consider favorably this suggestion. Weston again questioned whether in the case of certain

³¹See footnote 30, *supra*.

³²The letter named one such dealer, who is not a respondent; it added, "There are three or four others in this same category whose names I do not have. I will send them to you in a day or two. I believe we should eliminate this question first."

dealers the Union had a majority, but did not name any of the respondent dealers. Hansen indicated the Union was willing to submit proof of majority whenever negotiations began. The three discussed the question of the order in which possible negotiations should be conducted, Hansen and Owen urging that they should proceed according to the order in which the contracts had been presented, but Weston urging that the Potato Growers' negotiations should be conducted first. Owen asked if the dealers would consider an election covering the employees of all dealers in the area. Weston replied that he thought not, but that he would discuss the matter with the dealers and advise Owen of the result.

On March 23, Weston wrote Owen from Boise, stating that he had attended a convention of the Traffic Association at Twin Falls, Idaho, the preceding Saturday and had been unsuccessful after the meeting that night in an attempt to call together a quorum of a Committee on labor problems. He stated that he told those to whom he talked about the Union's insistence upon having further negotiations. Weston stated as to the order of negotiations that he believed the dealers' position to be the better one "inasmuch as we should eliminate all questionable cases involving the 51 percent rule before we proceed with the others." He suggested the possibility of getting an "advisory opinion" from the Board about the law with respect to the necessity of "bargaining for the entire industry." Weston stated an intention of seeing Owen on

March 26 or 27 after the meeting with a labor committee of the dealers, but did not communicate with Owen on either of those dates. On March 31, Weston wrote Owen another letter in which he stated that he had been unable to get the labor committee together for a meeting, but that he would be in Idaho Falls again the next day. The letter stated that Weston would discuss matters with the committee³³ and notify Owen "just as soon as we can arrange a meeting." Owen did not hear from Weston the next day, but a few days later received a copy of a letter dated April 3 in which Weston's secretary wrote Manager Hansen that Weston was ill in bed and could not attend the Monday meeting, presumably of the Traffic Association. Also on April 3, Owen wrote a letter to Weston in which he stated that in the meetings held there had been no negotiations in good faith, that he saw no reason for further meetings until the Union was shown that there would be such negotiations. The letter stated that charges of refusal to bargain were being filed with the Board. Owen filed such charges in April.

The 1941-42 potato season ended soon after these charges had been filed and there were no further dealings between representatives of the Union and the respondent dealers respectively until October 5, 1942. On that date Organizer Hansen and Owen

³³The letter mentioned "these committees," apparently referring to another committee which represented the employers in some negotiations then also pending as to certain creamery employees.

met Weston who said that there was a possibility some of the dealers could meet with the Union representatives. Weston asked Owen and Hansen if they could prove a majority for the Union. They assured him they could and Owen stated they would claim it as of the date the proposed contracts had been presented. Organizer Hansen about that time also talked to C. R. Holden about the possibility of discussing the situation with some of the dealers. Such a meeting took place on October 7. At this meeting Owen, Organizer Hansen, and International Representative Al May were present for the Union. Manager Hansen of the Potato Growers, L. B. Holden of Taube, C. R. Holden of Holden, A. G. Stanger of the Warehouse Company, De Long of the Traffic Association, and Wilson were present from among the respondents. On this occasion there was discussion of the wages being paid potato workers in the locality, the dealers explaining that labor pirating was causing wage increases. The Union representatives stated that the Union could be of assistance in stopping pirating. There was also discussion about "show-up time" and whether the dealers would be willing to pay employees for time spent in traveling between the warehouses and the cellars. Weston asked the Union representatives why they wanted such a lengthy agreement and Owen replied that it would be possible to write a two paragraph contract which would be satisfactory to the Union. The respondent dealers represented at the meeting inquired whether the Union would accept a wage and other items which the dealers

had agreed to among themselves. They asked the Union representatives to submit the proposal to the Union membership. The proposal was presented to the membership at a meeting on October 9 and the members did not agree to accept the proposed wages because of the disparity in wages that were being paid in the Idaho Falls and Shelley areas.

On October 12 Owen, May, and Organizer Hansen met with Weston. They presented him with a proposed contract. Weston called attention to the length of the contract and said he had understood the Union would be satisfied with a two-paragraph agreement. Owen replied that the document was something on which to start, and "probably could be cut down." Weston raised no other substantial objection to the document except to a closed shop clause, and the Union representatives expressed a willingness to delete or modify it. They also explained their version of how the Union could assist to stop pirating, provided it was given the check-off. The Union representatives stated that the Union could then issue termination slips whenever employees left their employment and prevent pirating by requiring the employees affected to report at the Union's office before receiving other employment. During the meeting of October 12 Weston agreed to submit a counter-proposal to the Union's proposed contract. He never did so. Organizer Hansen suggested that the Union representatives be allowed to meet with the dealers at the next

Traffic Association meeting on Monday, October 19, and those dealers who wished to negotiate a contract with the Union could do so. Hansen and Weston thereafter arranged for such a meeting.

On Saturday before the proposed meeting of October 19 Weston telegraphed Organizer Hansen that De Long was in the hospital and C. P. Holden and Manager Hansen had gone to Washington "on the price ceiling." The Union representatives and the dealers did not meet on October 19. On October 24, Weston wrote a letter to Owen in which he stated that the Union never had proved its majority and that the respondent dealers took the position there should be a certification "as of this date or as of the date of the filing of the Complaint and not as of February, 1942." The letter stated that the respondent dealers did not deem themselves obliged to bargain until proof of majority by certification or otherwise. About the time of sending the letter Weston saw Organizer Hansen, telling Hansen that he was recommending to the respondent dealers that they proceed with the hearing and that he saw no use of further negotiations. About the same time Weston similarly told Owen and May that the respondent dealers "were going to go on through with the hearing," and there was no use of further negotiations, although he believed an agreement could be reached if the hearing was postponed. Owen suggested that it should be possible to negotiate an agreement before the hearing.

Weston replied that he had no time to meet as he would be busy preparing for the hearing.³⁴

There have been no further dealings between the Union and the respondents. It should be noted, however, that apart from their dealings with the Union each of the respondent dealers gave wage increases to their employees about the time the Union began to organize the potato workers in January 1942, and further increases thereafter in April or May. All of them except the respondent Friedman, who had not yet resumed operations during the 1942-43 season, also have given wage increases since the opening of this season. The wages now paid as a result of these increases approximate those contained in the proposed contract submitted by the Union on October 12.³⁵

That the respondent dealers, who were presented by the Union with proposed collective bargaining contracts in February 1942, were unfriendly toward the Union became manifest soon after the Union's first meeting of the potato workers on January 16.

³⁴The findings regarding the meetings and communications between the respondents and the Union are based on the testimony of Owen and Organizer Hansen.

³⁵The proposed Union contract of February 1942 called with some exceptions for a wage rate of 65 and 75 cents per hour respectively for crew members and crew foremen.

The proposed Union contract of October 12 called for a wage rate of 85 cents per hour for male employees except for working foremen and head grader men with respect to whom it called for a wage rate of 90 cents per hour. The increases given by

The meeting of January 24 at the Idaho Falls City Hall, although ostensibly under the sponsorship of farmers in the vicinity, received the cooperation of Manager Hansen, C. R. Holden, L. B. Holden, J. E. O'Neil, and Carl De Long, and pursuant to arrangements made, employees from each of the warehouses involved in this proceeding attended. The express purpose of the meeting was to attempt a solution of the problems affecting these employees by a circumvention of the Union. The remarks of Metcalf as detailed above obviously were also for

the respondent dealers except to crew foremen and head grader men were as follows:

Name of respondent dealer	Rate at begin- ning of 1941-42 season	Rate paid after increases		
		Jan. or Feb.	Apr. or May	Fall of '42
Potato Growers	45 cents	55	60	80
Wilson	55 "	55	65	85
Taube	50 "	55	65	80
Friedman	50 "	55	60	(not operating)
Warehouse Company	50 "	55	60	80
O'Neil	55 "	55	65	80
Stuart	55 "	55	65	85
Holden	50 "	55	60	80

Each of the respondent dealers, except Friedman who was not operating, gave more than one increase in the fall of '42. The figures given for the fall of '42 represent the cumulative effect of these increases. The rate paid crew foremen by the respondent dealers was in each instance five cents higher than that given in the table above. The Union's proposed contract of October 12 also contained a separate wage demand for female employees, but as the respondent dealers do not presently hire such employees this portion of the proposed contract is not in issue.

the purpose of hindering the Union's efforts. He expressly disparaged the proposed contracts which had been submitted. Likewise the meeting called in February by Manager Hansen of employees in both the Idaho Falls and the Shelley warehouses of the Potato Growers was an attempt by that respondent to handle the situation by circumvention of the Union.

The opposition of the Grange and the farmers toward the Union constitutes no basis of defense for the attitude of opposition by the respondents. Moreover, the expressions of Manager Hansen and J. E. O'Neil at the meeting of March 7, and the activities of Manager Hansen in meetings of the Grange and other organizations were not designed to create understanding between the Union and the farmers, but were calculated to intensify the opposition of the farmers and the Grange to the Union. Thereafter, Weston's failure to meet with Owen on March 26 or 27 after having indicated an intention to do so in his letter of March 23 and his failure to communicate with Owen about April 1, regarding further negotiations as he had stated in his letter of the preceding date, indicate a reluctance to deal with the Union. The unilateral wage increases given the employees about that time and approximating the demands made by the Union further indicate a reluctance to deal with the Union. Weston's letter of October 24, breaking off such negotiations as had taken place during that month, again reveals a desire to avoid dealing with the Union. Of a similar nature were his statements to

Organizer Hansen, Owen and May about that time. The belated demand for proof of majority by certification or otherwise in the letter of October 24 was not a good reason for breaking off negotiations in view of the failure of the respondents at an earlier date to specify, as they had indicated they would do, with respect to which of the respondents the majority question was raised. The additional unilateral wage increases after the opening of the potato season in the fall of 1942, again approximating the Unions demands, and the failure of the respondents at any time to make counter-proposals also indicate an effort to avoid dealing with the Union. Moreover, the sum total of the respondents' conduct reveals an unwillingness to deal with the Union. This was evidenced at the March 2 meeting, at which time the respondents announced that, because of farmer opposition, they could not treat with the Union. Yet the respondents were quiescent to the antagonism of the farmers toward the Union, and several of them affirmatively encouraged it.

The undersigned finds that the respondents Potato Growers, Wilson, Taube, Friedman, Warehouse Company, Stuart and each of them refused to bargain collectively with the Union on or about March 2 and 26 and April 1, 1942, as the representative of their respective employees in the appropriate units in respect to rates of pay, wages, hours of employment and other conditions of employment and have thereby interfered with, restrained, and coerced their employees in the exercise of the rights

guaranteed by Section 7 of the Act. The undersigned further finds that these respondents and also the respondents Holden and O'Neil refused similarly to bargain collectively with the Union on or about October 24, 1942, and thereafter.³⁶ The undersigned further finds that by such refusal to bargain, by Metcalf's remarks concerning the Union and the proposed collective bargaining contracts submitted by it, by Manager Hansen's statement to Rash that he thought the latter was being misled by the Union, by his speech on March 7, his deprecation of the Union and suggestion that the respondent Potato Growers' employees form a labor organization of their own, his actions and those of Foreman concerning the election of a grievance committee by the employees of respondent Potato Growers, his speeches to the farmers at the Grange and other meetings as detailed above, and by the unilateral wage increases, the respondent dealers have interfered with, restrained, and coerced their employees in the exercise of the rights by Section 7 of the Act.

³⁶J. E. O'Neil, Holden Brother, Inc., and Traffic Association also participated in the acts here considered. The question of the responsibility of Administratrix O'Neil and Holden Brothers, respondents herein, for the acts of J. E. O'Neil and Holden Brothers, respondents herein, for the acts of J. E. O'Neil and Holden Brothers, Inc., respectively, and the responsibility of the respondent Traffic Association is discussed in Section V, *infra*.

- V. Administratrix O'Neil as the successor of J. E. O'Neil; Holden Brothers as the successor of Holden Brothers, Inc.; the participation in and responsibility of the Traffic Association for the unfair labor practices.

As set forth above, J. E. O'Neil died during August 1942 and since that time Administratrix O'Neil, a respondent in this case, has continued to conduct the same business substantially as conducted by J. E. O'Neil during his lifetime. While J. E. O'Neil was conducting the business he participated in the commission of certain unfair labor practices detailed above. He was one of those who, being represented by Weston, refused to bargain on or about March 2 and 26 and April 1, 1942. Moreover, he displayed his animus toward the Union by participating in the plans for and sending employees to the meeting of January 24, and by making a speech derogatory to the Union at the meeting of March 7, 1942. Johnson, his warehouse foreman, also displayed animus toward the Union by his remarks to Sorman in or about January 1942 as set forth above. Administratrix O'Neil, as J. E. O'Neil's business successor, continued the unfair labor practices by the refusal to bargain on or about October 24, 1942, and thereafter. Under the circumstances the undersigned finds that Administratrix O'Neil, respondent herein, as J. E. O'Neil's business successor, is responsible for the unfair labor practices committed by her as detailed above since her appointment as administratrix and it will be recommended that by reason thereof and the

unfair labor practices which her predecessor J. E. O'Neil committed as detailed above during his lifetime, she take certain action which the undersigned finds will effectuate the policies of the Act, as discussed in "The Remedy" below.

Holden, a partnership, similarly is a business successor to the Idaho operations formerly conducted by Holden Brothers, Inc. The partnership is conducting the same type of business, using the same property, and employing a substantial number of the same employees.³⁷ Both the corporation before dissolution and the successor partnership since its formation have participated in unfair labor practices. The corporation by the activities of C. R. Holden, participated in planning and sending employees to the meeting of January 24. It also, being represented by Weston, participated in the refusal to bargain on or about March 2 and 26 and April 1, 1942. The partnership resumed these unfair labor practices by the refusal to bargain on or about October 24, 1942, and thereafter. The undersigned finds that the respondent Holden is responsible for the unfair labor practices committed by it since its organization as a partnership, and it will be recommended that by reason thereof and the unfair labor practices committed by Holden Brothers, Inc., its business predecessor before its dissolution, the respondent Holden take certain action which the

³⁷There was considerable change in the personnel employed by all of the respondent dealers at the opening of the present season. There is nothing to indicate but what the employee situation in this regard was the same with this respondent as with the other respondent dealers.

undersigned finds will effectuate the policies of the Act as discussed in "The Remedy" below.

The Traffic Association through its Monday meetings constituted a forum in which the respondent dealers discussed their labor and other problems. De Long more than any other person presided at these meetings. It was at one of these meetings that plans were made to retain Weston to represent the respondent dealers in matters involving the Union. The Traffic Association acted as an intermediary through which a substantial number of the dealers paid Weston's fee for this service. De Long also was present with representatives of some of the respondent dealers in planning the meeting of January 24. He participated in the meeting of October 7, 1942, and his illness was given as one reason for not holding the planned meeting between representatives of the Union and the dealers on October 19, 1942. By the foregoing and other conduct the Traffic Association acted in the interest of the respondent dealers. It was a participant in and responsible for refusing to bargain collectively and certain acts of interference, restraint and coercion. The undersigned finds that the Traffic Association, acting in the interest of the respondent dealers, is an employer within the meaning of the Act.³⁸ Acting as agent and in the interest of the respondent dealers, respondent Traffic Association refused to bargain

³⁸Section 2 (2) of the Act provides: "The term employer includes any person acting in the interest of an employer, directly or indirectly, . . ."

collectively with the Union as the statutory representative of the employees in the appropriate units set forth above in respect to rates of pay, wages, hours of employment and other conditions of employment. The undersigned further finds that by such refusal to bargain collectively and other conduct detailed above the Traffic Association interfered with, restrained, and coerced the employees of the respective respondent dealers in the exercise of rights guaranteed them by the Act.

VI. The Effect of the Unfair Labor

Practices Upon Commerce

The activities of the respondents set forth in Sections IV and V above, occurring in connection with the operations of the respondents described in Section I above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VII. The remedy

It is essential to an effectuation of the purposes and policies of the Act that the respondents, and each of them, cease and desist from the unfair labor practices in which they have engaged and for which they are responsible, and, as a means of avoiding the consequences of such unfair labor practices, that they take certain affirmative action more particularly described below.

The undersigned has found that the respondents, and each of them, interfered with, restrained, and coerced employees of the respective respondents

in the exercise of the rights guaranteed them by the Act, or were responsible for such interference, restraint, and coercion. It is plain that the respondents, and each of them, must cease and desist from interfering with, restraining and coercing these employees in the exercise of such rights and the undersigned will so recommend. Moreover, since as the undersigned has found, the Traffic Association has engaged in and is responsible for certain unfair labor practices, the undersigned will for purposes of more completely and effectively remedying the situation recommend that the Traffic Association cease and desist from the unfair labor practices in which it has participated, or for which it is responsible.

Since the undersigned has found that the respondent Taube terminated the employment of and refused to reinstate Willard Moore, and the respondent Potato Growers terminated the employment of and refused to reinstate Milo Rash, because of their membership and activity on behalf of the Union, the undersigned will recommend that these respondents cease and desist from such discrimination. Moore testified that he has other employment and does not desire reinstatement. Under the circumstances the undersigned will not recommend that the respondent Taube offer Moore reinstatement but will recommend that it make him whole for any loss of pay he has suffered by reason of this respondent's discrimination against him, by payment to him of a sum of money equal to the amount he would normally have earned as wages

from the date of the discrimination against him to the date he obtained his present employment less his net earnings during such period.³⁹ Rash, who no longer resides in Idaho Falls, indicated that he would not consider reinstatement because of civil service employment which his wife presently has. The undersigned, therefore, will not recommend that the respondent Potato Growers offer Rash reinstatement but will recommend that it make him whole for any loss of pay he may have suffered by reason of this respondent's discrimination against him, by payment to him of a sum of money equal to the amount he would normally have earned as wages from the date of discrimination against him to the date his wife obtained her present civil service employment, less his net earnings during such period.

The undersigned has also found that each of the respondent dealers and the respondent Traffic Association as agent for and acting in their interest

³⁹By "net earnings" is meant earnings less expenses, such as for transportation, room, and board, incurred by an employee in connection with obtaining work and working elsewhere than for the respondent, which would not have been incurred but for the respondent's unlawful discrimination against him and the consequent necessity of his seeking employment elsewhere. See *Matter of Crossett Lumber Company and United Brotherhood of Carpenters and Joiners of America, Lumber and Sawmill Workers Union, Local 2590*, 8 N.L.R.B. 440. Monies received for work performed upon Federal, State, county, municipal, or other work-relief projects shall be considered as earnings. See *Republic Steel Corporation v. N.L.R.B.* 311 U.S. 7.

refused to bargain collectively with the Union. Accordingly the undersigned will recommend that the respondents, and each of them, cease and desist from such unfair labor practices, and in effectuation of the policies of the Act the respondent dealers and the respondent Traffic Association when acting as agent for and in their interest bargain collectively, upon request, with the Union, as the exclusive bargaining representative of the employees within the appropriate units.

Upon the basis of the above findings of fact, and upon the entire record in the case, the undersigned makes the following:

CONCLUSIONS OF LAW

1. Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, is a labor organization within the meaning of Section 2 (5) of the Act.

2. Idaho Traffic Association was and is an employer of the employees involved herein within the meaning of Section 2 (2) of the Act.

3. At all times material herein the employees of the respondent Potato Growers, on its cellar and warehouse crews at Idaho Falls and Shelley, of the respondent Taube on its cellar and warehouse crews at Idaho Falls and Shelley, of the respondent Wilson on his cellar and warehouse crews at Firth, and of the respondent Stuart on his cellar and warehouse crews at Shelley, and of all the other respondent dealers on their cellar and warehouse crews at Idaho Falls exclusive of office employees

and supervisory employees of higher rank than cellar crew foreman constitute and constituted in the case of each of said respondents a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. In or about February 1942 and at all times thereafter the Union has been the exclusive representative of the employees in such units for the purposes of collective bargaining within the meaning of Section 9 (a) of the Act.

5. By refusing on or about March 2 and 26 and April 1, 1942, and on or about October 24, 1942, and thereafter to bargain collectively with the Union, as the exclusive representative of the employees in such units, the respondent Idaho Traffic Association as agent for and in the interest of the other respondents, and the other respondents, and each of them, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (5) of the Act.

6. The respondent Taube by discriminating in regard to the hire and tenure of employment of Willard Moore, and the respondent Potato Growers by discriminating in regard to the hire and tenure of employment of Milo Rash, thereby discouraging membership in the Union, have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (3) of the Act.

7. By interfering with, restraining, and coercing the employees of the respondent dealers in the exercise of the rights guaranteed in Section 7 of the Act, the respondents, and each of them, have

engaged in and are engaging in, unfair labor practices within the meaning of Section 8 (1) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

9. The respondent Taube has not engaged in unfair labor practices within the meaning of Section 8 (3) of the Act respecting Jack C. Hendricksen, C. A. Falk, Clency L. Wadsworth, Mervin Crandall and Harold Goodell.

RECOMMENDATIONS

Upon the basis of the above findings of fact and conclusions of law, the undersigned recommends that:

1. Each of the respondents, Idaho Potato Growers, Inc.; W. P. Wilson; L. S. Taube, Ted Taube, and L. B. Holden, co-partners, doing business as L. S. Taube & Company; Meyer Friedman and Arthur E. Friedman, co-partners, doing business as S. Friedman & Sons; Idaho Falls Warehouse Company; Rowenah O'Neil, administratrix of the Estate of J. E. O'Neil, deceased; A. G. Stuart; C. R. Holden and L. L. Holden, co-partners, doing business as Holden Brothers; and Idaho Traffic Association, and their respective officers, partners, agents, successors, and assigns shall:

a. Cease and desist from:

(1) Refusing to bargain *collective* with Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of

Labor, as the exclusive representative of their respective employees in the units described above, except that the Idaho Traffic Association shall so cease and desist when acting as agent for and in the interest of the other respondents;

(2) In any other manner interfering with, restraining, or coercing the employees of the respondent dealers in the exercise of their rights of self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

b. Take the following affirmative action, which the undersigned finds will effectuate the policies of the Act:

(1) Upon request bargain collectively with Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, as the exclusive representative of all their respective employees in each of the units described above, except that the Idaho Traffic Association shall take such action when acting as agent for and in the interest of the other respondents;

(2) Post immediately in conspicuous places in the respective warehouses of the respondent dealers in Idaho Falls and Shelley, and in the place of business of the Idaho Traffic Association in Idaho Falls, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to employees of the respondent dealers, stat-

ing that the respondents, and each of them, will not engage in the conduct from which it is recommended that they, and each of them, cease and desist in paragraphs 1 a,(1) and (2) of these recommendations; and that they and each of them will take the affirmative action set forth in paragraph 1 b,(1) of these recommendations; and said employees of the respondent dealers are free to become or remain members of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, or any other labor organization and that the respondents will not discriminate against any employee because of membership or activity in such labor organization;

(3) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the date of receiving this Intermediate Report what steps the respondents, and each of them have taken to comply herewith.

2. The respondents, L. S. Taube, Ted Taube, and L. B. Holden, co-partners, doing business as L. S. Taube & Company, their agents, successors and assigns, shall, in addition:

a. Cease and desist from discouraging membership in Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, or any other labor organization of its employees, by discriminating in regard to hire or tenure of employment, or any term or condition of employment.

b. Take the following affirmative action, which the undersigned finds will effectuate the policies of the Act:

(1) Make whole Willard Moore for any loss of pay he may have suffered by reason of this respondent's discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages during the period from the date of such discrimination to the date he obtained his present employment less his net earnings during such period;

(2) Post immediately in conspicuous places in their warehouses at Idaho Falls and Shelley, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to their employees stating that they will not engage in the conduct from which it is recommended that they cease and desist in paragraph 2 a of these recommendations and that they will take the affirmative action set forth in paragraph 2 b (1), of these recommendations;

(3) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the date of receiving this Intermediate Report what steps this respondent has taken to comply with recommendations 2 a and b (1) and (2).

3. The respondent Idaho Potato Growers, Inc., its officers, agents, successors, and assigns shall, in addition:

a. Cease and desist from discouraging membership in Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, or any other labor organization of its employees, by discriminating in regard to hire or tenure of employment, or any term of condition of employment.

b. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(1) Make whole Milo Rash for any loss of pay he may have suffered by reason of this respondent's discrimination against him by payment to him of a sum of money equal to that which he normally would have earned as wages during the period from the date of the discrimination against him to the date his wife obtained her present civil service employment, less his net earnings during such period;

(2) Post immediately in conspicuous places in its warehouses at Idaho Falls and Shelley, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to its employees stating that it will not engage in the conduct from which it is recommended that it cease and desist in paragraph 3 a of these recommendations and that it will take the affirmative action set forth in paragraph 3 b (1) of these recommendations;

(3) Notify the Regional Director for the Nineteenth Region in writing within ten (10) days from the date of receiving this Intermediate Report what steps this respondent has taken to comply with recommendations 3 a and 3 b (1) and (2).

It is further recommended that the complaint insofar as it alleges that the respondent Taube engaged in unfair labor practices within the meaning of Section 8 (3) of the Act, with respect to Jack C. Hendrickson, C. A. Falk, Clency L. Wadsworth, Mervin Crandall and Harold Goodell, be dismissed.

It is further recommended that unless on or be-

fore ten (10) days from the receipt of this Intermediate Report, the respondents notify said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the respondents to take the action aforesaid.

As provided in Section 33 of Article II of the Rules and Regulations of the National Labor Relations Board—Series 2—as amended, effective October 28, 1942, any party may within fifteen (15) days from the date of the entry of the order transferring the case to the Board, pursuant to Section 32 of Article II of said Rules and Regulations, file with the Board, Shoreham Building, Washington, D. C., an original and four copies of a statement in writing setting forth such exceptions to the Intermediate Report or to any other part of the record or proceeding (including rulings upon all motions or objections) as he relies upon, together with the original and four copies of a brief in support thereof. As further provided in said Section 33, should any party desire permission to argue orally before the Board, request therefor must be made in writing to the Board within ten (10) days after the date of the order transferring the case to the Board.

WILLIAM B. BARTON,
Trial Examiner.

Dated: January 9, 1943.

In the United States Circuit Court of Appeals
for the Ninth Circuit

10490

IDAHO POTATO GROWERS, INC., W. P. WILSON, L. S. TAUBE, TED TAUBE, and L. B. HOLDEN, CO-PARTNERS, d/b/a L. S. TAUBE & COMPANY, MEYER FRIEDMAN and ARTHUR E. FRIEDMAN, CO-PARTNERS, d/b/a S. FRIEDMAN & SONS, IDAHO FALLS WAREHOUSE COMPANY, ROWENA O'NEILL, ADMINISTRATRIX OF THE ESTATE OF J. E. O'NEILL, DECEASED, A. G. STUART, C. R. HOLDEN and L. L. HOLDEN, CO-PARTNERS, d/b/a HOLDEN BROTHERS, and IDAHO TRAFFIC ASSOCIATION,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR REVIEW

To the Honorable, The Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The petitioners above named respectfully show and allege:

I. That your petitioners, with the exception of the Idaho Traffic Association are, and at all times hereinafter mentioned have been, Potato Packers, packing and shipping potatoes grown by them-

selves and others, with the principle places of business of the Idaho Potato Growers, Inc., L. S. Taube & Company, S. Friedman & Sons, Idaho Falls Warehouse Company, Rowenah O'Neill, Holden Brothers, in the City of Idaho Falls; W. P. Wilson in the village of Firth, and A. G. Stuart in the village of Shelley, all in the County of Bonneville and State of Idaho; that the Idaho Traffic Association is a trade association with its principle office in the City of Idaho Falls, County of Bonneville, State of Idaho; and that all the petitioners above named have been transacting business in the State of Idaho and within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

II. That heretofore, on or about the 14th day of October, 1942, upon charges filed by the Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, of the American Federation of Labor (hereinafter called the Union), the respondent, National Labor Relations Board (hereinafter sometimes referred to as the Board), issued a consolidated complaint against your petitioners, alleging that your petitioners had engaged in and were engaging in unfair labor practices, affecting commerce within the meaning of Section 8(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act (herein called the Act), and that the petitioners, Idaho Potato Growers and L. S. Taube & Company, had also engaged in and were engaging in unfair labor practices within the meaning of Section 8(3) and Section 2(6) and (7) of the Act, 49 Stat. 449, in that your petitioners had (1) through its officers,

agents and employees, made various statements to its employees discouraging affiliation or activity on behalf of the Union, and (2) have interfered with, restrained and coerced their employees in the exercise of their rights guaranteed to them in Section 7 of the Act, and (3) have refused to bargain with the Union as provided in Section 8(5) of the Act; (4) that the petitioners, Idaho Potato Growers, Inc., and L. S. Taube & Company, discharged and refused to reinstate certain employees, and (5) the petitioner, Idaho Traffic Association, is an employer in the meaning of Section 2(2) of the Act.

III. That on or about the 25th day of October, 1942, your petitioners duly served and filed their answer and a motion to dismiss, in which your petitioners denied that they had engaged in or were engaging in any unfair labor practices or had in any way violated the Act, as alleged in said consolidated complaint; moving to dismiss on the ground, among others, that the employees involved were engaged as agricultural laborers.

IV. That issue having been joined in the said proceeding before the Board and your petitioners, a hearing was held at Idaho Falls, Idaho from November 2nd to 10th, 1942, before William B. Barton, Trial Examiner duly designated by the Board.

V. That at the opening and close of the Board's case and at the close of the entire case, your petitioners duly moved to dismiss the Board's consolidated complaint and all proceedings thereunder on the ground that the (1) Board had no jurisdiction over the employees involved, inasmuch as they were

agricultural laborers; (2) that the cases of the above named petitioners were improperly consolidated; (3) that the petitioner, Idaho Traffic Association, was not an employer; (4) that the Union had not been designated as the proper bargaining agent, and (5) that the petitioners, C. R. Holden and J. E. O'Neill, were improperly joined as parties, inasmuch as their businesses had been transferred to new owners, but said motions were denied by the Trial Examiner.

VI. That during the course of said hearing, your petitioners duly objected to certain evidence offered on behalf of the Union and duly moved to strike out certain other evidence admitted over the petitioners' objections but the Board's Trial Examiner overruled said objections and denied such motions.

VII. That on or about the 9th day of January, 1943, Trial Examiner Barton filed his intermediate report in which he found and concluded that the petitioners had engaged in unfair labor practices and in which he recommended that the petitioners take certain affirmative action to remedy the situation brought about by such unfair labor practices, including the "making whole" of certain employees.

VIII. That thereafter, to-wit, on or about the 30th day of Jan., 1943, pursuant to the rules and regulations of the Board, your petitioners duly made, served and filed with the Board, its exceptions to the Trial Examiner's intermediate report.

IX. That thereafter, to-wit, on March 15, 1943,

oral argument of counsel was had before the Board upon the issues of fact and of law in said proceedings, in which argument counsel for your petitioners prayed that said consolidated complaint and the proceedings thereunder be dismissed upon the grounds set forth in petitioners' exceptions to the Trial Examiner's intermediate report and upon the further ground that neither the acts of your petitioners alleged in said complaint or the acts of your petitioners as shown in the testimony or other evidence at the hearing constituted any violation of the National Labor Relations Act, 49 Stat. 449, or of any other law or statute, the enforcement of which is entrusted to the Board.

X. That thereafter, to-wit, on or about April 10, 1943, the said Board did make and file its decision and final order in the said proceedings, which decision and order were served on your petitioners by mail on April 14, 1943, and by which your petitioners were ordered to:

"1. Cease and desist from:

(a) Refusing to bargain collectively with Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, as the exclusive representative of the employees of the petitioners in each of the units found above to be appropriate for the purposes of collective bargaining;

(b) In any other manner interfering with, restraining, or coercing the employees of the petitioners in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bar-

gain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

A. Take the following affirmative action; which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain collectively with Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, as the exclusive representative of all the employees of the petitioners in each of the units found above to be appropriate, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(b) Post immediately in conspicuous places in the respective warehouses of the petitioners in Idaho Falls, Firth, and Shelley, and in the place of business of the Idaho Traffic Association in Idaho Falls, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to employees of the petitioners, stating that the petitioners will not engage in the conduct from which they are ordered to cease and desist in paragraphs 1,(a) and (b) of this petition, and that they will take the affirmative action set forth in paragraph 1, A (a) of this petition;

(c) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps they have taken to comply herewith.

2. The petitioners L. S. Taube, Ted Taube, and L. B. Holden, co-partners doing business as L. S. Taube & Company, and their agents, successors, and assigns, shall, in addition:

A. Cease and desist from discouraging membership in Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, or in any other labor organization of their employees, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regarding to their hire and tenure of employment or any term or condition of their employment.

B. Take the following affirmative action, which the Board finds will effectuate the policies of the Act.

(a) Make whole Willard Moore for any loss of pay he has suffered by reason of the discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of the discrimination against him to the date on which he obtained his present employment, less his net earnings during such period;

(b) Insert in the notice which they are directed to post in paragraph 1, A (b) of this petition the statement that they will not engage in the conduct from which they are ordered to cease and desist in paragraph 2, A of this petition; that they will take the affirmative action set forth in paragraph 2, B (a) of this petition; that their employees are free to become and remain members of Teamsters,

Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor; and that they will not discriminate against any employee because of membership in or activity on behalf of that organization;

3. The petitioner Idaho Potato Growers, Inc., and its officers, agents, successors, and assigns, shall, in addition:

A. Cease and desist from discouraging membership in Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment.

B. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Make whole Milo Rash for any loss of pay he has suffered by reason of the discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of the discrimination against him to the date on which his wife obtained her present civil service employment, less his net earnings during such period;

(b) Insert in the notice which it is directed to post in paragraph 1, A (b) of this petition the statement that it will not engage in the conduct from which it is ordered to cease and desist in paragraph

3, A of this petition; that it will take the affirmative action set forth in paragraph 3, A (a) of this petition; that its employees are free to become and remain members of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor; and that it will not discriminate against any employee because of membership in or activity on behalf of that organization.

XI. That the Board's aforesaid decision and orders are erroneous in fact, unauthorized and insufficient in law, and ought to be reviewed and set aside by this Court for the following reasons:

(1) The said decision and orders, and the findings of fact and conclusions of law of the Board upon which the said decision and orders are based, are not in accordance with law, and the Board is without jurisdiction over the petitioners' employees, inasmuch as said employees are agricultural laborers within the meaning of such term, and definitions thereto applied.

(2) The Board, through its Trial Examiners, erred in admitting and considering incompetent, immaterial and irrelevant testimony prejudicial to petitioners, and is more fully and specifically set forth in petitioners' exceptions to the Intermediate Report filed by Trial Examiner Barton;

(3) The acts of the petitioners as shown by the testimony do not constitute a violation of the National Labor Relations Act;

(4) The Board erred in finding and concluding that your petitioners, by anti-union statements and

in other ways, interfered with, restrained and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act and thereby engaged in unfair labor practices within the meaning of Section 8(1) of the Act;

(5) Excepts to the finding and conclusion that the petitioner, Potato Growers, deals in or buys potatoes from non-members of its Cooperative Association, inasmuch as the testimony shows that this petitioner ships only potatoes of its members.

(6) Excepts to the finding and conclusion (on Page Eight of the report), that the authority to control the workmen working in the farmer's cellar rests entirely with the foreman, whereas the facts show that the farmer may discharge or stop the work or otherwise control the crew while working in his sorting cellar.

(7) Excepts to the finding and conclusion (Page Eight of the report), that employees involved are not agricultural labor.

(8) Excepts to the conclusion (on page twelve of the report), that the employee, Willard Moore, was discriminated against, whereas it appears that Willard Moore was one of the youngest men in point of service working for the company and, whereas it appears that all the employees laid off by L. S. Taube & Company were laid off because of seasonal lack of work and, whereas it appears from the record that Willard Moore was consulted by the employer and asked to report back for work. Petitioner excepts to the fact that the examiner

failed entirely to take note of the testimony that the employer, L. B. Holden, consulted Willard Moore, the employee, with reference to coming back to work, this conversation taking place within a few days after the lay-off.

(9) Excepts to the conclusion of the examiner (Page Eighteen of the report), that Milo Rash was discriminated against in regard to hire and tenure of employment, or that the employer in any way violated Section Seven of the Act.

(10) Excepts to the finding and conclusion of the examiner (on Page Nineteen of the report), that the warehouse at Shelley, Idaho and Idaho Falls, Idaho of the petitioner Potato Growers belong in one unit for purposes of collective bargaining, this by reason of the fact that these are separate and distinct employee groups and have been so treated and considered by the petitioner Potato Growers; the same exception applying to the petitioner, L. S. Taube & Company.

(11) Excepts to the conclusion of the examiner (on Page Twenty-three of the report), with reference to the meetings of October 7th and 12th, and, particularly, to the examiner's conclusion that a counter proposal was to be submitted by the employers and to the conclusion that the two paragraph contract referred to therein by Mr. Owens was merely a starter, whereas Mr. Owens at the October 7th meeting definitely agreed to a two paragraph contract without the closed shop, but later on and at the October 12th meeting, in the presence of organizer May, repudiated this offer.

(12) Excepts to the conclusion of the examiner (on Page Twenty-five), that the petitioners refused to bargain with the Union, whereas the record clearly shows that at the October 7th and 12th meetings, negotiations and bargaining in good faith were entered into on the part of all parties concerned. This was repeatedly admitted by the Union representatives during the hearing of the above cases.

(13) Excepts to the conclusions of the examiner that the petitioners, Rowenah O'Neill, as Administratrix of the Estate of J. E. O'Neill, and the partnership of C. R. Holden and his brother, are responsible for the acts or actions of J. E. O'Neill or Holden Brothers, Inc., and that the cases with reference to these petitioners should be dismissed.

(14) Excepts to the finding (on Page Twenty-seven of the report), that the Idaho Traffic Association interfered with or restrained the employees of the representative petitioners in the exercise of their rights.

(15) Excepts to the finding (on Page Twenty-seven of the report), that the petitioners, L. S. Taube and Potato Growers, are indebted to Willard Moore or Milo Rash, or that either of said employees has suffered any loss.

(16) Excepts to the ruling by the examiner denying the petitioner's motion to dismiss upon the grounds set forth in said motion, a copy of which is a part of the record herein.

Wherefore, your petitioners pray this Honorable Court to review and set aside the decision and or-

ders of the National Labor Relations Board herein referred to and to grant petitioners such other and further relief as to the Court may seem just and proper.

Dated: at Boise, Idaho, this 8th day of July, 1943.

THE PETITIONERS ABOVE
NAMED, AND EACH OF
THEM

By: E. A. WESTON

E. A. Weston, Their Attorney

State of Idaho,

County of Ada—ss.

E. A. Weston, being first duly sworn, states that he is the Attorney for the above named petitioners, and each of them; that he has read the foregoing petition and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

E. A. WESTON

Attorney for Petitioners

Subscribed and sworn to before me this 8th day of July, 1943.

[Seal]

MAX YOST,

Notary Public for State of Idaho. Residing at
Boise, Idaho.

My Commission expires January 13, 1945.

[Endorsed]: Filed July 10, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ON PETITION FOR REVIEW OF DECISION
AND ORDER OF THE NATIONAL LABOR
RELATIONS BOARD

ANSWER OF THE NATIONAL LABOR RE-
LATIONS BOARD AND REQUEST FOR
ENFORCEMENT

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Cir-
cuit:

Comes now the National Labor Relations Board,
and, pursuant to the National Labor Relations Act
(49 Stat. 449, 29 U.S.C., Sec. 151, et seq.), files this,
its answer to the petition for review of a Decision
and Order of the Board, and its request for en-
forcement of the Board's Order.

1. The Board denies the allegation contained in
paragraph I of the petition for review, that peti-
tioners, with the exception of the Idaho Traffic As-
sociation, are engaged in packing and shipping po-
tatoes grown by themselves, as well as others, and
asserts that, according to the certified transcript of
the entire record of the proceedings before the
Board, filed herein, none of the said petitioners
was engaged in the growing of potatoes except pe-
titioners W. P. Wilson and A. G. Stuart, who pro-
duced only from 10 to 15 percent and 5 percent,
respectively, of the potatoes sold and shipped by
them during the 1941-1942 season. The Board ad-
mits the other allegations contained in said para-
graph I of the petition for review.

2. In answer to the allegations contained in paragraphs II to X, inclusive, of the petition for review, the Board prays reference to the certified transcript of the entire record of the proceedings before the Board, filed herein, for a full and exact statement of the pleadings, evidence, exhibits, findings of fact, conclusion of law, and Order of the Board, and all other proceedings had in this matter before the Board.

3. The Board denies each and every allegation set forth in paragraph XI and subparagraphs (1) to (16), inclusive, thereof, of the petition for review.

Wherefore, having answered each and every allegation contained in the petition for review, the Board requests this Court to deny petitioners' prayer that the Decision and Order of the Board be set aside.

Further answering, the Board, pursuant to Section 10 (e) of the National Labor Relations Act, respectfully requests this Court for enforcement of its Order against petitioners dated April 10, 1943, entered in consolidated proceedings before the Board, entitled: "In the Matter of Idaho Potato Growers, Inc. and Idaho Traffic Association and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A.F.L., Case No. C-2489; In the Matter of W. P. Wilson and Idaho Traffic Association and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A.F.L., Case No. C-2490; In the Matter of L. S. Taube, Ted Taube, and L. B.

Holden, Co-partners, d/b/a L. S. Taube & Company and Idaho Traffic Association and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A.F.L., Case No. C-2491; In the Matter of Meyer Friedman and Arthur E. Friedman, Co-partners, d/b/a S. Friedman & Sons, and Idaho Traffic Association and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A.F.L., Case No. C-2492; In the Matter of Idaho Falls Warehouse Company and Idaho Traffic Association and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A.F.L., Case No. C-2493; In the Matter of Rowenah O'Neil, administratrix of the Estate of J. E. O'Neil, deceased, and Idaho Traffic Association, and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A.F.L., Case No. C-2494; In the Matter of A. G. Stuart and Idaho Traffic Association and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A.F.L., Case No. C-2495; and In the Matter of C. R. Holden and L. L. Holden, Co-partners, d/b/a/ Holden Brothers and Idaho Traffic Association and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A.F.L., Case No. C-2496." In support of its request for enforcement of its Order, the Board alleges:

(a) The unfair labor practices which are the subject of the present proceeding occurred in the State of Idaho within this judicial circuit;

(b) Upon the consolidated proceedings had before the Board in the aforesaid cases involving petitioners, including, without limitation, the amend-

ed charges, the complaint, answer, and hearing for the purpose of taking testimony, the Trial Examiner's Intermediate Report, the exceptions filed thereto, and the brief presented to and oral argument had before the Board, more fully shown by the transcript of the entire record filed herein, to which reference is hereby made, the Board on April 10, 1943, adopted the findings, conclusions, and recommendations of the Trial Examiner, except as otherwise noted in its Decision and Order, thereby duly stating its findings of fact and conclusions of law, and issued an Order directed to the petitioners (therein designated as "respondents"), and their respective officers, agents, successors, and assigns. So much of the aforesaid Order as relates to this proceeding provides as follows:

ORDER

Upon the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that:

1. The respondents, Idaho Potato Growers, Inc.; W. P. Wilson; L. S. Taube, Ted Taube, and L. B. Holden, co-partners doing business as L. S. Taube & Company; Meyer Friedman and Arthur E. Friedman, co-partners doing business as S. Friedman & Sons; Idaho Falls Warehouse Company; Rowenah O'Neil, administratrix of the Estate of J. E. O'Neil, deceased; A. J. Stuart; C. R. Holden and L. L. Holden, co-partners doing business as Holden Brothers; and Idaho Traffic Association, when act-

ing as agent for or in the interest of any of the other respondents; and their respective officers, agents, successors, and assigns, shall:

a. Cease and desist from:

(1) Refusing to bargain collectively with Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, as the exclusive representative of the employees of the respondent dealers in each of the units found above to be appropriate for the purposes of collective bargaining;

(2) In any other manner interfering with, restraining, or coercing the employees of the respondent dealers in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act.

b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Upon request, bargain collectively with Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, as the exclusive representative of all the employees of the respondent dealers in each of the units found above to be appropriate, with respect to rates of pay, wages, hours of employment, and other conditions of employment;

(2) Post immediately in conspicuous places in the respective warehouses of the respondent dealers in Idaho Falls, Firth, and Shelley, and in the place of business of the Idaho Traffic Association in Idaho Falls, and maintain for a period of at least sixty (60) consecutive days from the date of posting, notices to employees of the respondent dealers stating that the respondents will not engage in the conduct from which they are ordered to cease and desist in paragraphs 1, a, (1) and (2) of this Order, and that they will take the affirmative action set forth in paragraph 1, b, (1) of this Order;

(3) Notify the Regional Director for the Nineteenth Region in writing, within ten (10) days from the date of this Order, what steps they have taken to comply herewith.

2. The respondents L. S. Taube, Ted Taube, and L. B. Holden, co-partners doing business as L. S. Taube & Company, and their agents, successors, and assigns, shall, in addition:

a. Cease and desist from discouraging membership in Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, or in any other labor organization of their employees, by discharging or refusing to reinstate any of their employees or in any other manner discriminating in regard to their hire and tenure of employment or any term or condition of their employment.

b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act.

(1) Make whole Willard Moore for any loss of pay he has suffered by reason of the discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of the discrimination against him to the date on which he obtained his present employment, less his net earnings during such period;

(2) Insert in the notice which they are directed to post in paragraph 1, b, (2) of this Order the statement that they will not engage in the conduct from which they are ordered to cease and desist in paragraph 2, a, of this Order; that they will take the affirmative action set forth in paragraph 2, b, (1) of this Order; that their employees are free to become and remain members of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor; and that they will not discriminate against any employee because of membership in or activity on behalf of that organization;

3. The respondent Idaho Potato Growers, Inc., and its officers, agents, successors, and assigns, shall, in addition:

a. Cease and desist from discouraging membership in Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor, or in any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and

tenure of employment or any term or condition of their employment.

b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(1) Make whole Milo Rash for any loss of pay he has suffered by reason of the discrimination against him by payment to him of a sum of money equal to the amount which he normally would have earned as wages during the period from the date of the discrimination against him to the date on which his wife obtained her present civil service employment, less his net earnings during such period;

(2) Insert in the notice which it is directed to post in paragraph 1, b, (2) of this Order the statement that it will not engage in the conduct from which it is ordered to cease and desist in paragraph 3, a, of this Order; that it will take the affirmative action set forth in paragraph 3, b, (1) of this Order; that its employees are free to become and remain members of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 983, affiliated with the American Federation of Labor; and that it will not discriminate against any employee because of membership in or activity on behalf of that organization.

(c) On April 10, 1943, the Board duly served the aforesaid Decision and Order upon the petitioners.

Wherefore, the Board respectfully prays that this Honorable Court cause notice of the filing of this

answer and request for enforcement, and of the filing of the entire record in said proceedings before the Board, to be served upon petitioners, and that this Court take jurisdiction of the proceedings and of the questions determined therein, and make and enter upon the pleadings, testimony and evidence, and proceedings set forth in the transcript of the said proceedings, and up on the order made thereon, a decree denying the petition to review, and enforcing in whole said order of the Board, and requiring petitioners, and their officers, agents, successors, and assigns to comply therewith.

MALCOLM F. HALLIDAY

Malcolm F. Halliday

Acting General Counsel

NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C. this 9th day of August, 1943.

District of Columbia—ss.

Malcolm F. Halliday, being first duly sworn, states that he is Acting General Counsel of the National Labor Relations Board, respondent herein, and that he is authorized to and does make this verification in behalf of said Board; that he has read the foregoing answer and request for enforcement and has knowledge of the contents thereof; and that the statements made therein are true to the best of his knowledge, information and belief.

MALCOLM F. HALLIDAY

Acting General Counsel

Subscribed and sworn to before me this 9th day of August 1943.

[Seal]

JOSEPH W. KULKIS

Notary Public, District of Columbia. My commission expires April 15, 1947.

[Endorsed]: Filed Aug. 17, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Chief of the Order Section, duly authorized by Section 1 of Article VI, Rules and Regulations of the National Labor Relations Board—Series 2, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of a consolidated proceeding had before said Board entitled, "In the Matter of Idaho Potato Growers, Inc., et al., and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 983, A. F. L.," the same being Cases Nos. C-2489 to C-2496 before said Board, such transcript including the pleadings, testimony and evidence upon which the order of the Board in said proceeding was entered, and including also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony held before William B. Barton, Trial Examiner for the

National Labor Relations Board, on November 2, 3, 4, 5, 6, 9, and 10, 1942, together with all exhibits introduced in evidence.

(2) Copy of stipulation for correction of transcript of testimony.

(3) Copy of order, issued by Trial Examiner Barton on December 31, 1942, providing for correction of transcript, in accordance with stipulation.

(4) Copy of Trial Examiner Barton's Intermediate Report, dated January 9, 1943.

(5) Copy of order transferring case to the National Labor Relations Board, dated January 12, 1943.

(6) Copy of respondents' letter, dated January 22, 1943, requesting oral argument before the Board, and an extension of time to file exceptions and brief.

(7) Copy of telegram, dated January 23, 1943, granting all parties an extension of time to file exceptions and brief.

(8) Copy of respondents' exceptions to the Intermediate Report.

(9) Copy of notice of hearing for the purpose of oral argument, dated March 1, 1943.

(10) Copy of list of appearances at the oral argument held before the Board on March 16, 1943.

(11) Copy of Decision and Order issued by the National Labor Relations Board, April 10, 1943, with Intermediate Report annexed, together with affidavit of service thereof.

In Testimony Whereof the Chief of the Order Section of the National Labor Relations Board,

being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 9th day of August, 1943.

[Seal]

JOHN E. LAWYER

Chief, Order Section

NATIONAL LABOR RELATIONS BOARD

United States of America

Before The National Labor Relations Board
Nineteenth Region

Case No. XIX-C-1116

In the Matter of

IDAHO FALLS POTATO GROWERS ASSOCIATION AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. of L.

Case No. XIX-C-1117

W. P. WILSON AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. of L.

Case No. XIX-C-1118

L. S. TAUBE, TED TAUBE, AND L. B. HOLDEN; Co-Partners, d/b/a L. S. TAUBE & COMPANY; AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. of L.

Case No. XIX-C-1125

MEYER FRIEDMAN AND ARTHUR E. FRIEDMAN, Co-partners, d/b/a S. FRIEDMAN & SONS AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 983, A. F. of L.

Case No. XIX-C-1127

IDAHO FALLS WAREHOUSE COMPANY
AND IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F.
of L.

Case No. XIX-C-1129

ROWENAH O'NEIL, ADMINISTRATRIX OF
THE ESTATE OF J. E. O'NEIL, Deceased;
and IDAHO TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F.
of L.

Case No. XIX-C-1131

A. G. STEWART AND IDAHO TRAFFIC AS-
SOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F.
of L.

Case No. XIX-C-1137

C. R. HOLDEN AND L. L. HOLDEN, Co-partners
d/b/a, HOLDEN BROTHERS, AND IDAHO
TRAFFIC ASSOCIATION

and

TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS, LOCAL 983, A. F.
of L.

Bonneville County Court House
Idaho Falls, Idaho
November 2nd, 1942

The above-entitled matter came on for hearing
pursuant to due notice, as follows:

Before: William B. Barton, Trial Examiner.

Appearances:

William A. Babcock, Jr., and
Louis S. Penfield,
Attorneys,
Seattle, Washington,
Appearing for the Board.

E. A. Weston,
Box 1922, Boise, Idaho,
Appearing for the respondents.

Lee Owen, 140 South 1st Ave., Pocatello, Idaho,
Appearing for the Teamsters, Chauff-
eurs, Warehousemen & Helpers,
Union Local 983. [2*]

* Page numbering appearing at top of page of original Reporter's Transcript.

TESTIMONY

PROCEEDINGS

Mr. Penfield: Mr. Examiner, we would like to move to amend the complaint in one particular, by the,—I beg your pardon,—in two particulars. The first, with respect to the spelling of the names of one of the respondents in the company, the name of the respondent Stewart, which is spelling S-t-e-w-a-r-t and we are informed that that is in error and the correct spelling is S-t-u-a-r-t. Is that correct Mr. Weston?

Mr. Weston: Yes.

Trial Examiner Barton: Any objection to the correction?

Mr. Weston: No.

Trial Examiner Barton: That may be done.

Mr. Penfield: Then in the other connection we wish to make an addition of paragraph XV, being sub-section 5, which will read as follows: The Respondent Potato Growers, Respondent Wilson, Respondent Taube, Respondent Friedman, Respondent [21] Warehouse Company, Respondent O'Neil, Respondent Stuart, and Respondent Holden have individually and collectively at various times since January 16, 1942, granted wage increases to their employees, said wage increases were granted by the aforesaid respondents without discussion or negotiation with the Union and for the purpose of undermining the Union's position as the exclusive bargaining agency,—or representative of their respective employees.

It is our belief that this amendment will be in no way prejudicial to the respondents.

Trial Examiner Barton: Is there any objection?

Mr. Weston: Yes. We very strenuously object to that amendment on the grounds that these attorneys should have known this for several months and have made that known. Now they come in at this particular time and amend a material matter of great importance without giving us an opportunity to answer. This is a separate or another matter that requires a good deal of time to prepare and I think you can appreciate that for me or any other attorney to go into an amendment of such a nature at such a late time makes it practically impossible; I can't prepare to answer this now; it is practically impossible. I don't think they have a right to come in and take us by surprise like this with a matter they have undoubtedly *know* about for some time.

Mr. Penfield: Mr. Examiner, we have not had ample time [22] to secure all the information regarding this from the respondents and have been unsuccessful so far and as far as their being taken so by surprise and being prejudiced, at the present time I don't think it is, it is true; because the only issue is whether or whether or not they did or did not grant wage increases during this particular time and that evidence is available by the records.

Trial Examiner Barton: Is the evidence you propose to introduce under this paragraph severable from your other evidence?

Mr. Babcock: The evidence which we propose to introduce is the payroll records of the respondents, which are under the subpoena at this time and which are of course, the best record of any wage changes.

Mr. Penfield: We feel that this is implicit in the general matter of our complaint. We have merely set it forth in detail because we felt that is what we ought to do.

Mr. Weston: There is nothing in the complaint in this line at all.

Trial Examiner Barton: Well I am going to give the respondents every opportunity to meet the issue. I am going to allow the amendment, but I am going to say this, that any evidence that you have to introduce pursuant to this amendment, hold back to the end of the Board's case and at that time I will [23] decide as to whether the evidence should go in at that time or at a later time. It may be that in the event the Board should complete its case.

Mr. Weston: Could we be given any further time to answer that or are we to put our answer in during the trial?

Trial Examiner Barton: I will allow you ten days to make your answer.

Mr. Weston: From today?

Trial Examiner Barton: Yes. [24]

Mr. Penfield: Call Mr. C. R. Holden.

C. R. HOLDEN

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Barton: State your full name for the record, please.

A. C. R. Holden.

Q. (By Mr. Penfield) Mr. Holden, are you a partner in Holden Brothers, which is named in the complaint?

A. I am,—pardon me,—in the amended complaint; not in the first complaint we received.

Q. I think you are confusing the Charge with the Complaint, Mr. Holden. In the Complaint the name is “Holden Brothers.” A. I am, sir.

Q. Does the complaint state correctly the name of the partnership? A. It does. [27]

Q. When was this partnership formed?

A. July first, 1942.

Q. Did you have any connection with a corporation known as Holden Brothers, Incorporated?

A. Part ownership; yes, sir.

Q. When was this corporation organized?

A. 1939.

Q. And who were the incorporators?

A. J. M. McCauley; L. L. Holden, and C. R. Holden.

Q. And for what purpose was this corporation formed?

A. For the purpose of carrying on a produce business.

(Testimony of C. R. Holden.)

Q. Where?

A. We operated both here and in New York.

Q. Will you describe the nature of your operations?

A. Well, we handled mostly potatoes,—handled some onions,—and part of the potatoes were sold here, and part were sold in New York, and part of them were sold on the wire all over the country, the same as any other produce business. Does that answer your question?

Q. Did you maintain an office in New York?

A. McCauley & Son did; yes, sir.

Q. And you operated through them. What were they,—a brokerage firm?

A. They bought some outright, and some on brokerage, yes, sir. [28]

Q. Will you describe for us,—your actual warehouse was in Idaho Falls, was it not?

A. That is correct.

Q. Will you describe for us the nature of the physical properties which the Holden Corporation owned in Idaho Falls?

A. At that time when this was incorporated the only property they owned was the warehouse and equipment located in Idaho Falls.

Q. And what type of business was carried on in that warehouse?

A. Produce business.

Q. By a “produce business,” what do you mean, a little more in detail?

A. I mean wholesaling potatoes, which was buy-

(Testimony of C. R. Holden.)

ing and selling potatoes, and other commodities in the line of a produce business.

Q. You sorted and packed potatoes, did you not?

A. Yes, sir.

Q. You had facilities for the sorting and packing of potatoes at that warehouse?

A. We packed a large portion on the farms, but some were repacked in the warehouse here, correct. I would say that ninety per cent of our potatoes was packed in the growers' cellars on the farms, and some of those came into the warehouse and was repacked, and others moved direct in the cars. [29]

Q. Can you name for *the* the officers of the Holden Corporation?

A. The three parties I mentioned, J. M. McCauley, L. L. Holden and C. R. Holden.

Q. And who were the directors of the corporation?

A. J. M. McCauley, L. L. Holden, C. R. Holden, and Mrs. Annabelle Holden.

Q. And how many stockholders were there in the corporation? A. Three stockholders.

Q. Were they the same parties you have named as being the incorporators? A. Yes, sir.

Q. Was this true during the entire existence of the Holden Brothers, a corporation?

A. Of the corporation; yes, sir.

Q. Is this corporation still in existence?

A. No, sir.

Q. What happened to it?

A. We purchased the interest of J. M. McCauley

(Testimony of C. R. Holden.)

& Son,—L. L. Holden and C. R. Holden are operating now as a partnership. We purchased their Idaho interests.

Q. I don't know as I quite followed you there, Mr. Holden. You said, "we purchased it," do you mean L. L. Holden and C. R. Holden purchased it?

A. I mean L. L. Holden and C. R. Holden purchased the [30] *the* interests of J. M. McCauley & Son. We liquidated the corporation; it was all advertised according to law, and we operate now as a copartnership, mostly growing, but still shipping, potatoes.

Trial Examiner Barton: When did you liquidate the corporation?

A. Along about June 30th, 1942.

Q. Were legal steps taken to dissolve the corporation?

A. Yes, sir; it was handled according to law in the State of Idaho, and so advertised. [31]

Q. What I hand in mind, Mr. Holden, was to ascertain if you purchased Mr. McCauley's interests, and then went through these proceedings to dissolve the corporation?

A. I will answer this way: At the time Mr. McCauley stated his desire to sell out was when we decided to liquidate the corporation. I can't tell you just whether it was right on that date, or before, without checking the records.

Q. When the corporation was dissolved to whom were the assets distributed?

A. To the stockholders.

(Testimony of C. R. Holden.)

Q. To the individual stockholders?

A. To the stockholders of the corporation.

Q. I believe you have testified the partnership was formed [32] on about July first, 1942?

A. That is correct.

Q. And that partnership was comprised of yourself and Mr. L. L. Holden?

A. That is correct.

Q. Did the partnership acquire the assets of the corporation in its entirety?

A. They acquired most of the assets of the corporation.

Q. Did they acquire the physical properties used by the Holden Corporation in conducting its business in Idaho Falls?

A. Most of the property; yes, sir.

Q. That includes the warehouse and the sorting facilities that you have previously testified that were owned by the corporation?

A. The equipment, yes, sir.

Q. And all of the equipment. What is the business of this partnership?

A. Mostly growing potatoes, but we do handle some carlot potatoes.

Q. What do you mean by,—

A. I mean our general operation is farming. Most of our revenue and our operations is strictly farming, growing potatoes and stock.

Q. Does the partnership still operate their warehouse?

A. Part of the time, mostly for our own use in

(Testimony of C. R. Holden.)

production [33] that is handled and grown on our own farm.

Q. Do you still purchase potatoes and carry on sorting? A. We do, some; yes, sir.

Q. Do you,—and you have employees who are engaged in that work of sorting and handling the potatoes?

A. We have some employees, a small portion of the amount the old corporation you spoke of had. Most of the employees we now have work, a large portion of them, around on the farm, and sometimes work in the warehouse in the winter time when they can't work on the farm. That is correct.

Q. What percentage of the potatoes you now handle are from your own farm?

A. Well, I would say this season, off-hand, about sixty-five or seventy per cent.

Q. The remainder you purchase from other growers?

A. Up to date, yes, sir, or other carlot dealers. We had quite a few loaded cars we received from other operators.

Q. Are these carlot purchases already sorted?

A. Yes, sir.

Q. Or do you sort *of* them?

A. They are all loaded on the cars.

Q. Then when you stated sixty-five per cent were potatoes that were grown on your own farm, did you mean that the remaining thirty-five per cent were purchased to be sorted and packed by you?

[34]

(Testimony of C. R. Holden.)

A. That would also up to date this season include the cars we purchased loaded on the track, and what we haul from the country other than our own farm.

Q. What you referred to as carlot purchases?

A. Not altogether. It would make up the two, from other growers, and carlot purchases.

Q. Now, Mr. Holden, the Holden Corporation operated during the entire 1941-'42 potato season, did it not? That was last season?

A. It would depend on the expiration of your year. It operated half a year, if you want it to expire on January first. If it so happened your year expired in June, it would be the full year of 1941-'42.

Q. I was referring to the season during which potatoes are packed and shipped.

A. Out of this area?

Q. Yes.

A. That would be the 1941-'42 fiscal year; yes. [35]

Q. Now, will you describe for us in some detail the manner in which the business of the Holden Corporation was conducted? By that I mean, Mr. Holden, will you state for us what kind of produce the corporation handles, how it is purchased,—how the purchases of the produce were made, whether it used written purchase agreement, and how the price was agreed upon, and that sort of thing? Do you follow me, Mr. Holden?

A. No; I don't.

(Testimony of C. R. Holden.)

Mr. Weston: We object to that as being repetition. He has already told how he operates.

Mr. Penfield: No; he hasn't.

Mr. Weston: And what he does.

Trial Examiner Barton: Suppose that you restate the question, Mr. Penfield.

Q. Well, I believe you testified you handled produce, chiefly potatoes? [36] A. Yes, sir.

Q. Now, did the Holden Corporation purchase these potatoes from local growers, and by what sort of purchasing agreement or arrangement?

Mr. Weston: May I ask you to limit that as to a time.

Mr. Penfield: I was limiting it during the period when the Holden Corporation was operating during last season, which I believe to be typical.

Trial Examiner Barton: All right, the question is directed to last season.

A. As I understand the question it is, Did we use a written contract with the growers?

Q. I want to know what sort of an arrangement you had with the grower for the purchase of these potatoes?

A. We simply call the grower on the phone and buy the potatoes; we don't need any written contract. They deliver what they sell, and we take what we buy. There is no written contract,—if that answers your question,—in the purchase.

Q. On that feature of it. How do you agree on the price, and perhaps you could do it better

(Testimony of C. R. Holden.)

by describing a typical instance of your purchasing from a grower.

A. Well, it would depend on the case. There is a number of different ways we purchase from the growers. In many [37] cases we buy the potatoes from the grower and he packs his own potatoes and delivers them at the warehouse, or puts them directly on the car. There is a large volume of potatoes handled in that way,—was during that period that you mention. In many cases we buy potatoes from the grower at a given price, whatever we decide on, and the grower packs the potatoes and we haul them to the warehouse. It would be hard to give you the percentages without checking the records.

Q. Are there other cases where you do the hauling and packing?

A. In any case where we buy them in the farmer's cellar and all of the crew, or a portion of the crew, goes there to sort them, and the farmer might work himself, or furnish a portion of the crew; yes, sir.

Q. As a matter of fact, that was the more usual instance, during the last season, was it not, to purchase them in the cellar and send your crew out to sort and pack them?

A. I will answer that this way: We figure nine men to a crew, and we keep most of the time four crews in the country, which would be thirty-six men, and we kept one crew in the house, and these country crews stay in the country and sort pota-

(Testimony of C. R. Holden.)

toes in the farmer's cellar. In some instances, as I have said, farmers sort their own potatoes and the crew does not go into the farmer's cellar. [38]

Q. But in most instances you would send crews out?

A. I would say in a majority of the instances our country crews stayed in the farmer's cellar and did the sorting; yes, sir.

Q. Now, can you tell us just how these crews work, what they do,—the nature of their work, these country crews you referred to?

A. These country crews,—you are still talking about our particular operation?

Q. About your particular operation; yes.

A. It is our practice on the country crews, we line up nine men,—it takes nine men to the crew, and one man on the crew is the foreman, and they are known as country crews. They are very seldom in the warehouse, unless they should happen to leave from the warehouse and we furnish them conveyance to get to the job,—and they do practically their entire work on the farm, in the farmer's cellar. We buy these potatoes from the farmer. If he packs them, we allow him a certain amount for that. If we pack them, we buy them for so much and deduct the amount we pay for packing. In other words, if it costs you a dime to pack them, and the farmer packs them himself, we allow him a dime,—or we did at that time. If we buy them and pack them with these country crews, we figure we paid him a dime less on the price.

[39]

(Testimony of C. R. Holden.)

Q. In other words, you figure in the sorting cost when the price is agreed upon?

A. That is correct.

Q. Just what do each one of the workers on a country crew do, Mr. Holden?

A. Well, I don't know as I can state that. They all work on the sorter in the handling of the sorting of the potatoes and prepare them from their natural state into their processed state to be shipped. In other words, they take them out of the farmer's cellar without the culls and any decay that might be in them. They run these potatoes over a sorter and run them into bags, and then either the farmer hauls them with his own truck from his farm to the car, or to the warehouse, or we haul them with our trucks direct to the car or warehouse. Does that answer the question?

Q. Isn't it correct that you have two types of sorts, one in which they are graded for shipment in the cellar, and the other in which a rough grade is made for the purpose of eliminating the culls, and another grading made at the warehouse?

A. In cases where potatoes are washed, it is impossible to wash them on the farm. The grade is generally made on the farm, but they have to be run or sorted through the warehouse to be washed. The process is identically the same, with the exception they must run through the washer [40] into the bags before they go into the car.

Q. Then there is another grading made in the warehouse in many cases where they are washed?

A. Yes, sir.

(Testimony of C. R. Holden.)

Q. Do you have a foreman who does your hiring and firing?

Trial Examiner Barton: Are you talking about the corporation, or about the partnership?

Mr. Penfield: I am still talking about the corporation.

A. We have a foreman who is in charge of the warehouse. We very seldom have any occasion for firing a man.

Q. What I mean to get at is his authority rather than what he does?

A. I would say he did have authority in case it was [41] necessary to use it; yes, sir.

Q. Does he do most of your hiring?

A. No; he doesn't.

Q. Who does?

A. We did most of our own hiring at that time. My brother or myself did most of the hiring.

Q. The two of you were in actual charge of the operation then?

A. We were in charge of the business at this end of the line; yes, sir.

Q. And you hired the men who were used in your warehouse crew or on the country crews, is that correct?

A. Most of the time. Sometimes if we were short in a crew the growers would pick up some of the farm boys to make up the crew. In that case they would hire them and we would pay them.

Q. They would agree through you,—they would call you and tell you they had somebody to do the job?

(Testimony of C. R. Holden.)

A. When the boys came in at night the foreman would have a list of the men who worked; yes, sir, and the men who the farmer might have put on, or maybe the farmer and his boys themselves would be on the list. That is correct.

Q. All employees, including the country crews, were on the payroll of the Holden Corporation, and that payroll was made up at your warehouse office, is that correct? [42]

A. I stated before the payroll was made up at the warehouse, and in some cases if they had the farmer work, we simply added that to the price of the potatoes, and the farmer paid the crew. In cases where we had part of our workers on, we paid the crew direct.

Q. You spoke of having three crews in the field most of the time. Who paid their wages?

A. Whenever they were full crews we paid them, unless we bought them at so much packed. In that case the farmer would pay them, and we would pay him a dime more for his potatoes in that case.

Q. In either case, though, they worked under the crew foreman?

A. Worked under the,—

Q. Under the crew foreman?

A. Where we buy them and he does the sorting, and we pay an extra dime, he is actually the boss until the potatoes are graded. He guarantees the grade, and if they fail to make grade, naturally he has to stand the sorting.

Q. What do you mean by, "he guarantees the grade?"

(Testimony of C. R. Holden.)

A. All potatoes are purchased on Federal grades, either U. S. No. 1, or U. S. No. 2, or whatever it might be, and even though we buy direct from the farmer, and even though he uses some of our men, he guarantees the grade. In other words, if we allow a grower \$1.10 for potatoes and potatoes [43] were \$1.00 where we packed them, if he did not make the grade he would have to pay for double sorting, or sort them himself on the car. We would simply furnish the bags, and he would guarantee to meet the grade of U. S. No. 1, or U. S. No. 2, or whatever the case might be.

Q. What is the name of the warehouse foreman?

A. The name of the warehouse foreman we have over there now is Mr. Geiger.

Q. Who was warehouse foreman last year?

A. Well, we had different foremen there. Mr. Geiger was foreman most of the time last year.

Q. Who tells these crews where to go? Do they report to the warehouse in the morning?

A. Those that don't have,—in particular those that don't have transportation, we arrange to haul them out. They report at the warehouse. Those that had their own transportation in many cases at that time went direct to the job in the country.

Q. How are they informed as to what job to go to?

A. When they leave a job today, they know whether there is a day's work there, or not tomorrow, and before they finish that job, why, some-

(Testimony of C. R. Holden.)

one in the warehouse, either the foreman, or whoever happens to be in charge of the office, instructs them where to go to next, or in the meantime maybe Jim Jones, or some other grower might call up and want to [44] sell two cars of potatoes, and he might tell them himself when they get through at his neighbors to come to his place.

Q. But those directions where to go come directly or indirectly from the warehouse?

Mr. Weston: We object to the form of the question. That is assuming his answer means one thing, when it doesn't. That isn't what Mr. Holden said, and we object to the form of the question.

Mr. Penfield: I am asking if that is true.

Trial Examiner Barton: Let's put it this way: Do the directions as to where to go always come from the warehouse office?

A. I would have to answer this way: In most cases, unless, as I stated before, if a grower,—a neighbor someplace where we were working, he might come over that afternoon unbeknownst to us, and if they were through he might have the crew move over to his farm, either for that part of a day, or the following morning.

Q. But all of the purchasing agreements are made through the office? A. That is correct.

Q. And it is after you have made a purchase agreement that you know where to send a crew, is it not?

A. Well, naturally, we don't send a crew out,—many times growers may want their potatoes

(Testimony of C. R. Holden.)

sorted up and pay for it, [45] and not move them for a month or so afterwards, but we don't send a crew out until some arrangements are made.

Q. But you have to either directly send the crew, or have to have some understanding with the grower with whom you have the contract whereby the grower tells the crew to come over to his farm, for example, after sorting nearby,—isn't that about the way it work? A. Yes, sir.

Q. Now, is the work,—bear in mind I am still referring to last year and to the Holden Corporation,—is the work performed in the cellars different from the work performed in the warehouse? If so, in what manner?

A. No; it is identically the same work, with the exception the potatoes in the warehouse might be washed, or might be put up in different size packages.

Q. But the sorting and the grading that takes place is essentially the same type, is that correct?

A. The grading done on the farm, if they are prepared for market and go direct to the car, is identically the same as the work done in the warehouse, with the exception of possibly if they had to be washed; yes, sir.

Q. But if it is a rough grading, the grading on the farm may be less expensive, is that correct?

A. I don't quite understand the question as to rough grading. They all grade U. S. No. 1, or U. S. No. 1 or [46] whatever the grade might be, before they leave the farmer's cellar.

Q. Perhaps I used the wrong words. What

(Testimony of C. R. Holden.)

I meant was, "rough sorting." I meant the sorting of the culls from the potatoes before they bring them to the warehouse.

A. In some cases there would be a rough grade made in the country where it wouldn't meet the requirements of U. S. No. 1, with the understanding that the farmer would take the shrinkage on identically the same work in the warehouse if they were washed.

Q. I believe you have already testified in some,—in a certain manner with regard to the length of the potato season. As I understand what you mean by the "potato season," is the season in which potatoes are harvested and shipped. The normal season,—now, I wonder if you would state again just approximately what that period is.

A. I said the old potato season,—what is known as the old potato season in Idaho, normally starts about September first and ends June first.

Q. That is the normal season?

A. However, many operations go straight through the season, due to the fact a new area starts before an old area is cleaned up. [47]

Q. What was the policy of the Holden Corporation with respect to employees who would return to work in December,—I mean, in the fall of the year when the new season commenced?

A. I don't know as I quite understand you, Mr. Penfield.

Q. Did you seek to reemploy the men who had been working when the former season closed down?

(Testimony of C. R. Holden.)

A. In most cases that was true; the same boys who had been working would be back.

Q. Did you notify them of the commencement of the season in any manner?

A. Most of them would be notified about what time we would be ready to start, yes, sir. Of course, no one knew the exact time because your potatoes don't ripen that way.

Q. And in some instances they might contact you as to when they were supposed to start? [49]

A. In many cases.

Q. And it was your practice to give a preference in re-employment to the employees that had been working for you? A. Naturally.

Q. Do you know whether that was the general practice among other potato shippers?

A. I can answer in this way: It must have been because very seldom do we have a man who has been working in another warehouse come to us for employment. That would indicate they want to go back to those places.

Q. Now, you have testified, Mr. Holden, in regard to the manner in which the business of the Holden Corporation was carried out with respect to country crews and the warehouse crew, and that sort of thing. Now, will you tell us, what if any difference there is in the conducting of the business of the partnership this year?

A. Well, as I stated on your first question,—I believe it was, Mr. Penfield, the partnership in the new organization, which has nothing to do with

(Testimony of C. R. Holden.)

the Holden Brothers, Incorporated, the main source of revenue and operations is farming and growing stock. [50]

A. The normal period of the potato season, we *we* were talking of, which would take in two years, particularly last year 1941 and early 1942, would be over a period of nine months.

Q. Aren't there fluctuations in the shipments; aren't there some parts of the year that are a good deal heavier than others?

A. Not necessarily, except early fall and early spring are our two peak seasons as a rule. It didn't so happen to be [57] this year, due to abnormal conditions, but generally that is the case.

Q. What is the situation generally after the first of the year?

A. Well, it isn't a general thing, not a peak shipment of course, but the Government changes that now; but when you run into the cold weather, well then we will lose quite a lot of time and many times that cuts in on the sales during that period of the year.

Q. But what is,—there is considerable activity during the first part of the year?

A. I would say your heaviest movement in our case and in all districts is in the Fall. Your records, your Government records would bear that out I believe.

Q. Do you have any recollection of the conditions in February of last,—ought to be of this year, February 1942?

(Testimony of C. R. Holden.)

A. Just what conditions particularly?

Q. I mean the activity; whether it was the normal activity and you had normal crews on?

A. I don't just recall offhanded, but I would say it was the normal, yes.

Q. When did it begin to taper off?

A. Well, that would also depend on weather conditions, over the following three months. The heavy movement as a rule starts tapering off in March. [58]

Q. In March. Taper off pretty gradually?

A. It depends; it depends on the crop. Last year was a comparatively small crop, I would say it possibly began tapering off faster than usual last year, due to a short crop. [59]

Q. Mr. Holden, do you know of the Idaho Traffic Association? A. Yes sir.

Q. Will you tell us when it was formed and for what purposes?

A. I don't know as I could tell you the exact date it was formed. It was formed for the purpose of handling traffic matters for the growers and shippers of Idaho, relative to freight rates, truck transportation out of the State, and that is about the extent of its activities as far as I know.

Q. Do you hold office in the Association?

A. I do not.

Q. Have you ever held office? A. No sir.

Q. Have you ever been a member of the Board of Directors? A. No sir. [65]

(Testimony of C. R. Holden.)

Q. (Mr. Penfield) Who comprises the membership of the traffic association?

A. I couldn't tell you that Mr. Penfield. Possibly covers most of the potato industry in the State. Some of the growers and shippers organizations, but I couldn't tell you just who the members are just off-handed.

Q. Was Holden Brothers Incorporated a member?

A. I think they were.

Q. Is Holden Brothers a member?

A. Yes sir. [66]

Q. How often does the traffic association meet?

A. They have no regular meeting dates. The manager of the traffic association handles traffic matters and he informs the dealers through bulletins in, relative to freight matters and they are subject to call. Now, what you have possibly,—leading up to here,—we have a daily,—or weekly luncheon here that is more or less of a social affair. Every Monday the dealers meet but that doesn't necessarily mean a meeting of the traffic association, as you will find a lot of railroad men and transportation men and other people that go to these meetings, so it isn't really a meeting of the traffic association.

Q. Do you know Carl DeLong?

A. Yes sir.

Q. Who is he?

A. Carl DeLong, at this time, happens to be the Secretary and manager of the Idaho Traffic Association.

(Testimony of C. R. Holden.)

Q. How long has he held that position?

A. I don't recall the exact time or date. I think shortly after the traffic association was organized.

Q. Did you regularly attend these Monday meetings of the growers?

A. I attended a good many of them, yes sir.

Q. Did Carl DeLong attend many of them?

A. He attended most of them, most of the time when he was in town, but his duties takes him to the other parts of the State a good deal and many of the times he would not be at these [67] meetings and in that case someone else was in charge of the meetings.

Q. Is Carl DeLong the Chairman whenever he was there?

A. Not all the time. In most of the cases when he was there I would say he was Chairman, yes sir.

Q. Is there any secretary at the meetings regularly?

A. No sir.

Q. Were any minutes kept?

A. To my knowledge they were not.

Q. Is the principal office of the traffic association in Idaho Falls?

A. Yes sir. [68]

Mr. Penfield: I would like to offer at this time a certified copy of the articles of incorporation of the Idaho Traffic Association. Do you have any objection Mr. Weston?

Mr. Weston: No.

Trial Examiner Barton: The document may be admitted as Board's Exhibit 2. [69]

(Whereupon, document heretofore referred

(Testimony of C. R. Holden.)

to marked Board's Exhibit 2 for identification
was received in evidence.) [70]

BOARD'S EXHIBIT No. 2

State of Idaho,

County of Bonneville—ss.

I Hereby Certify, That the within is a full, true
and correct copy of the Articles of Incorporation
of Idaho Traffic Association, Inc. as appears of
record in my office. Book 1 Art. of Incorporation,
Page I.

In Witness Whereof, I have hereunto set my
hand and affixed my official seal at Idaho Falls,
Idaho, this 28th day of October, 1942.

[Seal]

W. L. BREWRINK

Clerk and Ex-Officio Recorder

By GRACE McINTOSH

Deputy

No. 148996

Articles of Incorporation
Of

Idaho Traffic Association, Inc.

Know All Men By These Presents: That we,
the undersigned residents of the State of Idaho,
and all of whom are of full age, and citizens of
the United States, have this day voluntarily asso-
ciated ourselves together for the purpose of form-
ing a corporation under the laws of the State of
Idaho, according to, and in compliance with Chap-
ter 10, Article 29, Idaho Code Annotated.

(Testimony of C. R. Holden.)

And We Hereby Certify, In Writing:

I.

That the name of the corporation shall be Idaho Traffic Association, Inc.

II.

That the purposes for which this corporation is formed are:

(a) To furnish shippers service of every kind and nature to the members of the association, and to render help and assistance in all matters appertaining to traffic problems of all kinds, and matters arising out of the preparation, inspection, sale and shipment of merchandise and commodities of whatsoever nature.

(b) To own, lease, purchase, hold and have, use and take possession of and enjoy, in fee, real or personal property necessary for the uses and purposes of the corporation, and to sell, lease, alien or dispose of the same at the pleasure of the corporation, and for the uses and purposes for which the corporation is formed.

(c) Pecuniary profit to the corporation or its members is not the object of this corporation, and no pecuniary gain or profit is contemplated.

III.

That the existence of this corporation is fifty (50) years.

(Testimony of C. R. Holden.)

IV.

That the number of directors of said corporation shall be seven (7).

V.

That the registered office of said corporation in the State of Idaho shall be located at Idaho Falls, in the County of Bonneville, State of *of* Idaho; and that the postoffice address of the registered office of said corporation in the State of Idaho is Idaho Falls, Idaho.

VI.

Corporations, associations, co-partnerships, as well as persons, may become members of this association. There shall be one class of membership in the association. All members of the association shall have equal rights therein and shall be permitted to take part in the deliberations of the Association, shall be entitled to vote on matters coming before the association and to hold office. This corporation shall not issue any capital stock, but shall issue membership certificates to each member thereof, which certificates cannot be assigned without the consent of the Board of Directors and under such rules and regulations as may be prescribed by the by-laws.

VII.

The by-laws of this corporation may, in addition to the other provisions prescribed by law, provide: (a) the number and qualifications of members and the terms and conditions of admission; (b) the time, mode, conditions and effect of expulsion or

(Testimony of C. R. Holden.)

withdrawal from, and of restoration to membership; (c) fees for admission, assessments or dues to carry on the business of the corporation, and reimbursement for services rendered and expenses incurred by the corporation for its members, the time of payment and manner of collecting amounts due and for forfeiture of the interest of a member in the association for non-payment thereof; (d) other regulations not repugnant to the laws of the state and consonant with the objects of the association.

VIII.

The By-Laws of the corporation shall be adopted by the Board of Directors elected by members of said corporation and may be thereafter amended or repealed by a majority vote of all the membership.

IX.

That the following are the names of the members and their respective addresses, who have subscribed to these Articles of Incorporation:

Name	Address
A. G. Stanger	Idaho Falls, Idaho
Chris Christensen	Shelley, Idaho
J. E. O'Neil	Idaho Falls

In Witness Whereof, We have hereunto set our hands and seals this 2nd. day of December, 1941.

(Testimony of C. R. Holden.)

State of Idaho

County of Bonneville—ss.

I do hereby certify that on this 2nd. day of December in the year 1941, before me, the undersigned Notary Public in and for said State of Idaho, personally appeared A. G. Stanger, Chris Christensen and J. E. O'Neil known to me to be the persons whose names are subscribed to the above and foregoing instrument, and acknowledged to me that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal]

W. B. MINOR

Notary Public

Residing at: Idaho Falls,
Idaho

My commission expires May
9, 1943

21007

Articles of Incorporation of Idaho Traffic
Association, Inc.

State of Idaho
Department of State
Secretary's Office
Boise, Idaho

Approved, filed and admitted to the records of Articles of Incorporation of the State of Idaho and certificate issued this Fifth day of January, 1942 at 3:30 o'clock P. M.

(Testimony of C. R. Holden.)

Fees Paid

Filing \$5.00

Recording 1.80

Certificate

Total \$6.80

GEO. H. CURTIS,

Secretary of State

By AGNES DUNN,

Corporation Clerk

Recorded at the request of Henry S. Martin

January 7th, 1942 at 4:02 p. m.

Fee \$.50

Book 1 of Art. of Incorporation, Page I

L. B. HOLDEN

called as a witness by and on behalf of the Board,
being first duly sworn, was examined and testified
as follows:

Direct Examination

Q. (Trial Examiner Barton) State your full
name? A. L. B. Holden (spelling).

Q. (Mr. Penfield) Mr. Holden, are you a part-
ner in L. S. Taube & Company? A. Yes sir.

Q. Does that name in the complaint, is it the cor-
rect name of the partnership?

A. I believe it is. Will you read that over?

Mr. Babcock: It is L. S. Taube & Company, the

(Testimony of L. B. Holden.)

“and” being abbreviated and “company” being spelled out.

Q. (Mr. Penfield) When was that partnership formed?

A. I couldn't tell you without looking back, exactly when it was formed.

Q. Well, can you tell us approximately?

A. I believe it was the first part of 1941; I am not quite sure about the time.

Q. Where is its principal office?

A. Kansas City, Missouri.

Q. And does the partnership maintain any plants or offices in the Idaho Falls area? [75]

A. Yes. We have a plant here and we have a plant at Shelley, Idaho.

Q. Those are the only two in this area?

A. Yes.

Q. And what is the business of this partnership. I will limit my questions in this connection, Mr. Holden, to the business of these two plants in the Idaho Falls area?

A. Well, I would say originating potatoes and storing potatoes.

Q. Will you describe for us the manner in which you conduct this business?

A. Well, it is like all produce business. We buy them from the growers and also buy on the track from the other dealers and the potatoes from the dealers, when we pay for them and buy them on the outside, of course, they are packed and loaded by them and those that we buy in bulk we load

(Testimony of L. B. Holden.)

ourselves and the grower packs a certain percentage.

Q. Then as to the packing, as far as buying from the dealer is concerned you have nothing to do with that? A. No, just the loading sometimes.

Q. Insofar as you buy potatoes from growers will you describe just how these transactions with the growers are entered into?

A. Well, they are made mostly verbally by,— we don't have any contract that we use. And if a grower calls in and wants to sell or he calls in and possibly he wants us to send some- [76] one out to look at the potatoes and then if we will buy them sometimes we buy them and he will pack them and sometimes we will pack them and if he packs them he gets the raise in price by doing that and offsetting the price he would pay for packing and if we pack them they will offset that, or grade them in the cellar and that is all of course done on a price.

Q. So as far as the potatoes you pack is the particular price considered the net price you quote loaded in the car?

A. In some instances we do buy them loaded, especially on outside States, we have done that occasionally from growers and sometimes our buyers buy them loaded on the cars and we give the loaded price for them, plus the packing and sometimes he will even pay for the inspection himself, and sometimes we will pay for it.

Q. Well I mean how frequently do you purchase

(Testimony of L. B. Holden.)

in that manner as contrasted with purchasing in which you are doing all the packing?

A. Well, according to how the grower wants to sell. Some of them want to pack their own potatoes.

Q. Well, that wasn't my question, my question: it was more directed to what is the frequency, or what is the percentage that you purchase on the basis of your doing all the packing?

A. Well, it is according to the time of the season and it depends on many things. You take in the harvest time of course the growers don't have the time then to do much packing; [77] but as he gets on into the winter time then the growers may band together, four or five of the neighbors, and pack potatoes.

Trial Examiner Barton: Well as to the centering of the season as a whole, would you say that during that time 50 per cent of the potatoes you buy from the growers they pack their own potatoes?

The Witness: No, not that high.

Trial Examiner Barton: How high would you say?

The Witness: Off-hand, oh, 15-20 per cent.

Q. (Mr. Penfield) Does the partnership grow any potatoes?

A. Well we used to. We don't at this time.

Q. You do not. Did you last year?

A. No, we didn't.

(Testimony of L. B. Holden.)

Q. Then all the potatoes that you pack will be produced or grown by some grower in the vicinity?

A. Yes.

Q. Will you describe for us the type of crews which you employ and the duties performed by these different types of crews you employe?

A. Well, we employ about the same type of crews that all other dealers do. About so many men to the crew.

Q. About how many men in the crew?

A. Well, we vary of course, according to the size of the cellar there is and what sized equipment we can get into the cellar. Some of them cellars are very small and we have to put in a very small sorter sometimes. [78]

Q. Then do you use 5 or 6 men?

A. Yes, sometimes go as high as 9 or 10 men, depending on as I say.

Q. Do you send your own equipment out?

A. Yes, we do, but practically all potato growers have got equipment of their own years ago.

Q. How many crews do you have in the respective plants in Idaho Falls and Shelley, Idaho?

A. Well it depends, as I say, it is according to the time of the season and the crop and many things. At this time it is getting very slow, of course, because right after the harvest at this time we had in the plant 2 to 4 men crews in this part, —not in the plant, but we used there and out the 2 to 4 men crews in this part of the country and generally 3 to 4.

(Testimony of L. B. Holden.)

Q. Now, are those crews sent out from your plants on assignment to the different cellars to work?

A. Well sometimes. Sometimes the growers will call in to have them help out, get someone to make up a crew for them from one of those men, and it's depending on who is working for them if they need more experienced or better help, but they have their own crews.

Q. Who pays those men?

A. Well, depending upon how the potatoes are bought. If we buy them in the cellar we pay the expenses or if we buy them packed or loaded then they pay the expenses. [79]

Q. Well let's limit our questions and answers to the type of transactions in which you buy the potatoes, with the understanding that you are to pay all of the expenses of the packing; then am I correct then in saying that you pay all of the expenses of the crews, no matter how they are paid?

A. Not necessarily, no, not if the grower pays them, if he pays that expense.

Q. No, I was attempting to limit it to the situation where you were doing the packing; you were doing the packing and sending out the country crew and in those instances do you pay the expenses of the crews, pay their wages?

A. Well I would say that most of the time we do, however, there is times when we run potatoes up to the growers and leave them in the cellar till he wants to sell them, maybe doesn't want to do it then if the boys are busy.

(Testimony of L. B. Holden.)

Q. Well who would pay the wages?

A. Well there are times when we would pay the wages and there are some times when he would pay the wages, when the growers pays them. If he sells them to some other dealer then he does but if he sells them to us at some other date later then he does or we just deduct them.

Q. But as this work is done, I mean, there are workers actually performing this work and that work has to be paid for at the time of the work and who pays for that?

A. If the grower doesn't we do. [80]

Q. Well you pay them then?

A. Well, if the grower doesn't we do. We don't in the case the grower pays them, because he gets that much more for his potatoes when he sells them then.

Q. Now, these country crews are regularly being sent out from your plants, is that correct?

A. Well, if we have the work for them to to do. If the growers are selling so that we would have some place for them to go.

Q. Well when you receive an order from the grower that he has some potatoes to pack, the understanding is that you will send out a crew, is that correct?

A. Well not every time. We will send these men out if he wants them to pack them.

Q. Well I am trying to limit this to the understanding you will do the packing, isn't that right?

A. Well yes.

(Testimony of L. B. Holden.)

Q. And those crews are sent out from your plant on those occasions? A. Yes.

Q. And do you transport them to the place where they will work and back? A. Yes.

Q. And at the conclusion of the day will they return to your warehouse? [81]

A. Well depending on which district they are coming from, if they are coming by their home on the way in they will stop off there, or if they are coming through town, or wherever they might be coming from, some packing place, and maybe not going through town.

Q. And if the job is completed they will be taken to the warehouse?

A. Unless they are coming by their place and it is after they are on the way home they could be dropped off; they could you know.

Trial Examiner Barton: How are these men put on a job; are they told at the warehouse to go out at this place, to a certain job?

The Witness: Well, there might be they would have a job in some cellar, if a grower wants them to come over. Lots of times in a neighborhood if they are packing one grower's cellar there will be three or four and they will band together and take one right after another and do their own and there will be times one grower will tell them, when he has the crew, that he has sold and he wants them to come over there but they will tell them every night generally so they will know where they are going the next morning.

(Testimony of L. B. Holden.)

Trial Examiner Barton: Is that the common practice for the grower each night to tell them where they are going the next day?

The Witness: Well, not necessarily. In fact, if they [82] should finish the cellar that night and haven't any place to go we try to keep some work ahead for them to work on.

Trial Examiner Barton: There are times when they are not assigned any work for the next day, is that correct?

The Witness: At times when, they are not assigned work for the next day, yes; like in cold weather or where the growers don't want to sell.

Trial Examiner Barton: What do you do, do you telephone back to the various men or how do you get in touch with them when you want them?

The Witness: Most of them have no phone.

Trial Examiner Barton: Well how do you contact them then?

The Witness: Well most of the time we tell them to come back or if they have nothing to do they will come back anyway and come around, to see.

Trial Examiner Barton: Suppose you need some of the crew members, what is your method of communication?

The Witness: Well as a rule we just get in a car and go after them because there is no percentage of them that has phones.

Q. (Mr. Penfield) Mr. Holden, are you the manager of both the Idaho Falls and the Shelley operations? A. In Idaho, yes.

(Testimony of L. B. Holden.)

Q. Do you have a foreman? A. Yes. [83]

Q. And who is that foreman?

A. Well I have a foreman at Idaho Falls here and at Shelley also.

Q. And what are the names of those foremen?

A. My foreman at Idaho Falls is Art Levin and my manager at Shelley is Leland Wright.

Q. And did you say who your foreman was at Idaho Falls?

A. Yes. Art Levin is the foreman here.

Q. In Idaho Falls? A. Yes.

Q. Who was your foreman last year?

A. Carl Metcalf.

Q. Now, do these foremen hire the employees on the country crew?

A. Yes. They hire the employees, yes.

Q. Do you also have a warehouse crew?

A. Well, not necessarily. If we have work to do in the country and not in the warehouse then the men go to the country to work.

Q. Will you contrast for us the type of work done by the country crew and the warehouse crew?

A. Well yes. They have to make the grade, U. S. Grade No. 1 or U. S. Grade No. 2 in the country the same as they do in the warehouse. Our potatoes are all sorted and bought on grades. They are times when they are dirty or roughed up, [84] roughed over, and but they are brought in, and then as soon as prices are a little higher then the growers are all inclined to sell them in the cellar and it is all about the same.

(Testimony of L. B. Holden.)

Q. Am I correct then to say that in some instances your country crews will do the grading and sorting and the packing and then the potatoes will be directly placed in,—

A. (Interposing) Yes, that's right.

Q. While in other instances they may just sort out the culls and then the potatoes that are ungraded will be brought into the warehouse?

A. They generally sort out the number two's and the culls and bring in the number one's, those in that grade.

Q. And then they will go through the washer, those potatoes, in the warehouse and before selling?

A. Well, some of them will go through the washer and we will sell them and then some of them we run dry at the warehouse and at the celars on the farms.

Q. But in those instances where they are brought in to the warehouse they will be run through a grader in the warehouse, is that right?

A. Yes.

Q. And will that work on the grader be substantially the same as the country crews?

A. Well, a lot faster of course, because they will grade them up out there to where they are practically all one's at that time. [85]

One small warehouse crew can take care of two or three country crews you understand by having the facilities.

Q. But the type of work that they do is about the same? A. Yes.

(Testimony of L. B. Holden.)

Trial Examiner Barton: Well I want to be sure about something. I understand,—so I understand the situation, now is it true that sometimes the potatoes will be sorted and graded in the country and brought right in from there and placed in the cars for shipment?

The Witness: Yes sir. Most all of our dry packing is that way.

Trial Examiner Barton: Who transports them from the country to the railroad line in the city or town?

The Witness: Well it depends on how they are bought. If the grower has a truck and he wants to sell and truck them in himself to make that extra money he does that or if he has anybody that is a neighbor with a truck they sometimes do it.

Trial Examiner Barton: Does the partnership have any trucks?

The Witness: Yes, we have trucks.

Trial Examiner Barton: Now in other instances the potatoes are brought from the country to the warehouse and the sorting and grading and packing is done at the warehouse, is that correct?

The Witness: It works both ways. According to how the growers sell. This season they all want to sell and have them [86] packed in the farmers' cellars.

Trial Examiner Barton: Where they are brought into the warehouse for sorting and packing, do you customarily haul them from the cellar?

(Testimony of L. B. Holden.)

The Witness: Well if the farmer or grower has a truck of his own or a neighbor's, they will bring them in, and when they are brought here then he will get the price at the warehouse and will make that difference in hauling them himself.

Trial Examiner Barton: Well then sometimes you haul them and sometimes you don't, the grower hauls them, is that correct?

The Witness: Yes.

Trial Examiner Barton: All right.

Q. (Mr. Penfield) Now did I understand you to say that your foreman has supervision over all of your employees, both in the country and in the warehouse?

A. As a rule he does have, yes sir. Of course, we have a foreman that goes out with the crews, that is, the crew foreman.

Q. Yes. Now, what are the duties of these crew foremen? A. What?

Q. What are the duties of these crew foremen?

A. Well as a rule they are a man, men that can make the grade and be more or less supervisory making the grade, knowing the grade. [87]

Q. He is usually the chief grader then, he knows the grades of potatoes?

A. Well he knows, yes.

Q. And he does the work, working himself?

A. Well he maybe wouldn't be a better man *that* some of the others, but he would more or less take care of the equipment and be responsible.

(Testimony of L. B. Holden.)

Q. He does not have anything to do with the hiring and firing of the members of the crews?

A. Well he could have, if he had someone that couldn't do the work or wasn't doing the work, he could send him in, send word in to the warehouse if he had someone that was not satisfactory.

Q. But it would go through the foreman who stays at the warehouse? A. Possibly so, yes.

Q. You have someone called a buyer?

A. Yes.

Q. And what does that buyer do?

A. Well, he was to,—he has different duties to perform. If he has any extra time he can build cars and unload cars outside maybe, or go on inspection on cars from those bought of other dealers and also buy from the growers or from other dealers.

Q. Does he go out to the cellars and inspect?

[88]

A. Yes.

Q. Does he direct any of the workers?

A. Yes, if there is something that needs to be, if there,—if you have to change cellars he may take word out; or he may help them change or help move.

Q. Does he actually make the purchases, the arrangements with the farmers?

A. Well, not all the time. Sometimes the growers will come in and sell at the office or call up.

Q. But he does do that?

A. He does do a certain,—to a certain extent, yes; a certain percentage of it.

(Testimony of L. B. Holden.)

Q. Is he a confidential employe of the company?

A. Well I don't know what you mean by confidential?

Q. Well does he have,——

A. (Interposing) He helps the crews and checks them to see that the grade is made correctly.

Q. He works in the office to a considerable degree too, does he?

A. Not very much. He is in and out. He has to inspect cars occasionally, but he is not in the office as much as he is outside.

Q. Is there,—I believe you stated that you are the manager of both the Shelley and the Idaho Falls plants?

A. Well, I have a manager down there at Shelley, and I get [89] down there very seldom, but I am responsible of course, as far as getting the stuff out. But anything comes up I take it up with the manager of the plant.

Q. Is there an interchange of employees back and forth between the two plants?

A. Well there is at times, but not very often. When there might be work at one place and none at the other we might have a need for them. We don't have a need for them very often. But if we are in need, if we can use help and use the boys we give them the transportation there.

Q. How far away is Shelley?

A. About eight miles, I believe.

(Testimony of L. B. Holden.)

Q. At the opening of a new season and Fall does the company make it a practice to re-employ those workers who had been employed during the previous year?

A. Well it is almost impossible to do that because so many of them don't come back.

Q. Well I don't mean that, but I mean if they don't report back do you send for them?

A. If they report and if they are capable men we do, yes.

Q. Well, do you send for them, to get back the men you had on your crews previously or get them back on the crews if possible?

A. Well, if we can locate them, yes.

Q. Do you have any practice with respect to notifying them [90] when your season opens?

A. Well they have,—as a rule they come over when the season opens or, they know about what time to come, when they are going to open the season of course. Most of them are moving around from place to place and living on the farms in the winter time and a good many of them do that and come in in the spring and work as a summer crew or some of them move into town.

Q. Do you ever write or phone to them?

A. No, most of them don't have phones and we don't have a record of their addresses.

Trial Examiner Barton: In what period of the year is sorting done in the farmers' cellars?

The Witness: Well I would say from, as a rule, October first. All these potatoes, as a rule, have to

(Testimony of L. B. Holden.)

go in the cellar or in storage. Most of them are in the country and as soon as they are put away they are generally checked or packed in October and some of them go on, it goes on till about to the first of May or the first of June till it is cleared up.

Trial Examiner Barton: And your sorting in the warehouse?

The Witness: It would be about the same. There would be days that we don't pack in the warehouse at all when we pack at the farmers. We find it is cheaper to sort them at the farmers, at their cellars.

Q. (Mr. Penfield) Did you hear Mr. Holden testify in [91] regard to the length of the season and the periods of greatest activity?

A. Well I wouldn't,—I would say that our operation would be possibly heavy from the time the deal starts some time in September until the harvest is over and then we generally get a lull after the harvest until some time after November, then they start to sell again around the middle of December to January. The middle of September is when we started.

Q. Would you give us the classifications of the employees that you have on the cellar crew and describe for us the type of work each one of them does?

A. Well, we really don't classify our men, only with the exception of our crew foreman on the country crew.

Q. Well aren't there,——

(Testimony of L. B. Holden.)

A. (Interposing) And he would get,—we generally pay him a nickel more an hour than we do the rest of the men.

Q. And, well I didn't necessarily mean with respect to what you paid, I suppose there is a certain classification or differentiation as to the classification of work they do; I wonder if you could tell us that?

A. Well of course when you are running a machine, you have the man who puts them in the hopper.

Q. What do you call him?

A. Well, you could call him the scooper or the dumper. I would say scooper possibly, and then you will have your grader man on the side and then up in front, up front of the machine [92] you will have the man that packs them.

Q. What is he called?

A. Well, I don't know; I guess he is a packer.

Q. Don't you have somebody that jigs them or packs them in sacks?

A. Well that is what he does, *is* it goes in the sacks he takes the sacks off and puts on empties; fills them and then there is a sewer and then you have a man on the side who pulls the culls off.

Trial Examiner Barton: You have a machine there?

The Witness: Yes, sorting.

Trial Examiner Barton: And you take that with you from farm to farm to do the grading or sorting?

The Witness: Yes. And, in fact, most of the

(Testimony of L. B. Holden.)

cellars are in the ground and we back the machine up the, that cellar to do the work.

Trial Examiner Barton: Most of the farmers, or some of the farmers you say have machines?

The Witness: Yes. There are quite a number of them have machines of their own.

Q. (Mr. Penfield) What is the number of classifications whose type of work is done in the warehouse is there that differ?

A. It's about the same.

Q. You do have some carloaders do you? [93]

A. Well, yes, you would have a man. However, you would have to take them away from the machine and load them, yes. And then you might have an extra man to help clean up and help the crews unload or something like that.

Q. Does the country crew load the sacks on to the trucks? A. As a rule he does.

Q. Does the whole crew assist in that?

A. Well as a general rule if you have a whole crew it is cheaper to load without an extra man, but as a rule the whole crew does the loading.

Q. They will load or a farmer's crew does the loading?

A. Yes. It is customarily the practice for one of the crew or all of the crew to help.

Cross-Examination

By Mr. Weston:

Q. Lloyd, can you tell us how much control if any the farmer has over,—when these crews are out

(Testimony of L. B. Holden.)

working at the farmer's, whether directly or indirectly?

A. I would say one hundred per cent as to staying on, as if the potatoes are not sorted to his satisfaction or his way of [94] thinking; I don't know what the general practice is, but he will put him out or he will call up and have someone else called out; that farmer may do that. May be the grower who was thinking or thought it was not a fair grade and something was going in that should come out and he would call up the office and say to send out certain ones or take this crew out entirely.

Q. He really runs the show then?

A. Oh yes. These potatoes are bought, that is, as U.S. Grade No. 1 and if we miss the grade we call the grower up and he will come in and he hasn't paid until they are all number one grade.

Q. With reference to when you close in the Spring, are these employees working for you given any assurance that they are to be hired again in the Fall?

A. No assurance, no sir.

Q. Could you give me an estimate at this time of how many of your crew worked for you in February 1942?

A. No sir. I wouldn't know, but, oh, I don't believe there is over half of them, maybe not that many, because there is a lot of them in the armed forces and scattered in the defense plants and most of them never showed up this Fall. [95]

(Testimony of L. B. Holden.)

Redirect Examination

By Mr. Penfield:

Q. In connection with the farmer being in the cellar, he merely looks over the potatoes as they are going through?

A. That is it; as they are graded.

Q. And he doesn't actually exercise any supervision over the workers?

A. Well he has, if they don't grade to suit him, he don't get his potatoes graded satisfactorily, he gets someone else; that is the general practice since I have *been Idaho*.

Q. Well he generally makes his complaint to the office, doesn't he?

A. Well, to the office, or he makes it to the employees sometimes. Sometimes he will call up and say that he is not satisfied and we will buy in the cellar with the understanding that if they are dirty they can be checked and we will possibly have to change the deal later.

Q. He doesn't actually fire any of them, of the workers; he may just ask for another man and you will send out another man to satisfy him and put that man on another crew maybe?

A. No, that isn't the rule. If he is not satisfied he will stop the crew possibly and tell somebody about it and wait until somebody gets out there to straighten them out and if the boys are grading *to* high and the potatoes are too dirty he comes in to talk it over. But as a rule in the past the grower is [96] owner of the potatoes till they leave the

(Testimony of L. B. Holden.)

cellar and lots of times till they put them on the cars and when they have to be at such a price he takes a loss on the potatoes, like when they are dirty or wormy this runs into a good many dollars.

Q. Are there many of the potato growers that watch the graders?

A. Very few. They don't want to have them graded or sorted, or they don't want you to come in there unless they are there to watch.

Q. Most of the time there is very little complaint on the grading?

A. Well sometimes, it depends on the season and what we have to work on.

Q. But in the majority there aren't?

A. Well, lots of times we do have. Then, the growers sometimes have a condition of decay of the potatoes or wire worm and, that he didn't realize he had in the cellar.

Recross Examination [97]

Trial Examiner Barton: Well let's get at it in this way: What does the farmer normally do while the crew is on his premises at work?

The Witness: He is normally in the cellar and around the place and as a rule the grower,—if we are going now to a cellar we will generally let the grower know we are going to be there at a certain time and if he happens to be, if he is going to a sale or going to town he will want to wait till he can be there.

Trial Examiner Barton: How does the conduct

(Testimony of L. B. Holden.)

of the crew differ while under the foreman or under the farmer?

The Witness: Well the foreman is there to take care of the equipment and we believe,—to see that the grade is made. You mean the man at the sorting?

Trial Examiner Barton: Yes. [98]

The Witness: Well, it's been a practice in all districts since I have been in Idaho that any time the grower isn't satisfied he can put the crew out of his cellar and that has been the general practice.

Q. (Mr. Weston) And to that extent he does control the, have control over the crew?

A. As far as the growers' status, yes.

Q. Do you know how many farmers or how many employees or farm boys working on the farms work on these same potato, who plant and harvest the potatoes for the company?

Mr. Weston: Well this is *there* witness Mr. Examiner. We are just trying to establish whether agricultural employees were used here; certainly I can find out whether or what crew worked there and they were brought back and forth,—

Mr. Penfield: (Interposing) That is not the issue. It is as to what the employees of Taube company do.

Mr. Weston: That is the question, if you had been listening you would have heard the question, I said the company. At whose,—

Mr. Penfield: That is what I thought that was

(Testimony of L. B. Holden.)

what you said and I object to it, it is wholly immaterial.

Trial Examiner Barton: Oh, I will let him answer the question. [99]

A. Well, I would say a large percentage of them do help on the farm and some in the harvest.

Q. So that a large percentage of them do work?

A. I couldn't say what the percentage was, but we will have a lot of them as soon as the beets are in and harvested and they will come in; we had a lot this year, or last year.

Q. They help plant and help harvest?

A. They will help harvest and put them in the cellars and come back and help us.

Q. And when you are packing they will go back, —when you are through,—they will go back to the farm? A. Yes.

Trial Examiner Barton: Who pays these crews when they are working on the farmer's cellar?

The Witness: Well it is according to the way it is bought. We haven't bought any on contract, except verbally, and it has been our practice to have a sort of combined contract, that is, there are times when we will buy them at the growers and if we do that he pays his own crew and if we buy them at the warehouse we pay the crew, or we can pay the crew.

Trial Examiner Barton: Well how is that done?

The Witness: Well I don't know, but I suppose that lots of times the neighbors around there will pitch in and come in and help each other.

(Testimony of L. B. Holden.)

Trial Examiner Barton: But I,—when you are doing the sorting for the farmers who pays the crew? [100]

The Witness: Yes, we pay the crew. There are times though that he has paid the crew and *he if* wanted to hold his potatoes any length of time he would have the right to sell them to any other dealer.

Trial Examiner Barton: In other words, there are times when the farmer pays the crew that you send out from the warehouse, is there?

The Witness: There are times, yes.

Trial Examiner Barton: But that is unusual?

The Witness: Yes.

Trial Examiner Barton: Are these crews normally paid at the end of the day or the end of the week?

The Witness: We generally figure it to on Thursday night and that is up until Thursday night and paid on Friday, so they will have their checks on Saturday.

Q. (Mr. Weston) In case the potatoes are poor run is there more work on the farm so that the farmer has to pay more for packing?

A. I didn't get that.

Q. In case the potatoes are poor runs is there more work on the farm; does the farmer have to pay more for the packing then?

A. Yes, it would be taken out. He would get less money for his potatoes then. [101]

Q. That is net? A. Yes, net.

(Testimony of L. B. Holden.)

Q. In other words, the farmer in the final analysis pays the crew for the packing?

A. Yes.

Q. Is that an exact charge for the particular amount in his particular packing, in each instance?

A. Well, a good pack will sell for more than a poor pack.

Q. And the labor makes the difference?

A. Yes, the labor, and the sacks and the crops.

Redirect Examination

By Mr. Penfield:

Q. Mr. Holden, the fact of the matter is that when you are going to do the packing you agree on the price with the farmer, do you not, and that price includes the price of the labor?

A. That is,—if we buy them that way, yes.

Q. That is what I mean.

A. Yes, if we buy them we agree on a price, too.

[102]

Q. And the price that you have agreed upon would not be changed, regardless of how the,—or the type of work done in handling the potatoes, is that correct?

A. If they are bought where we pack them the price would be the same.

Q. Yes. [103]

FARREL L. HANSEN,

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Trial Examiner Barton: State your full name, please.

A. Farrel L. Hansen.

Trial Examiner Barton: How do you spell your first name, Mr. Hansen?

A. F-a-r-r-e-l.

Q. (By Mr. Babcock): You reside in Idaho Falls, Mr. Hansen, do you not?

A. Not right in town; I live on Route 5.

Q. What is your occupation?

A. I am manager of the Idaho Potato Growers.

Q. And how long have you held that position?

A. About five years.

Q. What is the true name of the association?

A. Idaho Potato Growers, Incorporated.

Q. Has there been any change in the name recently? A. Yes, sir.

Q. When was that?

A. Oh, this spring some time, or early summer, —I can't remember the exact date.

Q. Was that done by amendment to the articles?

[104]

A. Yes, sir.

Q. Prior to that time the name was "Idaho Falls Potato Growers Association?" A. Yes, sir.

Q. What are your duties as manager of the association?

(Testimony of Farrel L. Hansen.)

A. Well, I have general supervision, general management of all of the details incident to the conducting of the business.

Q. Who are the officers of the association?

A. Oh, Mr. Anton Poitevin is president,—

Q. Probably you had better spell that.

A. A-n-t-o-n P-o-i-t-e-v-i-n. Leo Murdock is vice president; Fred Gustafson is secretary-treasurer.

Q. And who are the directors?

A. Mr. E. S. Trask is a director; Monte Carlson is a director; Wesley Huntsman is a director; and Roy Marquess is a director. [105]

Q. Is this correct: That Poiteven was president; Murdock was vice-president and Gustafson, secretary and treasurer, as well as being directors, in January, February and March of this year?

A. I think that is right.

Q. No change in those? A. No, sir [106]

Q. Is it also true that Carlson and Trask were directors at that time? A. Yes, sir.

Q. Is the association a cooperative association of farmers? A. Yes, sir.

Q. Do the farmer members have an equal vote in the meetings? A. Yes, sir.

Q. An equal interest, so far as their stock is concerned? A. Yes, sir.

Q. How often do you hold meetings of the membership?

A. One annual meeting,—that is provided for in the by-laws. In addition to the annual meeting, any

(Testimony of Farrel L. Hansen.)

other number of meetings are subject to call of the president or the board of directors, or the members themselves.

Q. Have you had any special meetings,—meetings that were called, from time to time?

A. Yes; at various times.

Q. How often do the directors meet?

A. Once a month we have a regular directors' meeting. It is provided that they meet once a month.

Q. And do the officers meet any more frequently than that?

A. Well, again, that is subject to the necessities, according to the requirements of the business involved, in question [107]

Q. Now, the association buys potatoes, or receives potatoes from its members, is that correct?

A. That is not correct. We do not buy potatoes.

Q. Do you receive potatoes from members?

A. We handle them for members.

Q. Does the association, through its employees, receive potatoes of the members in the cellars and sort them and handle them?

A. It depends on what interpretation you put on "receive." We virtually don't receive anything; we market potatoes for the farmers.

Q. I understand that, but they are handled by the employees of the association?

A. That is right.

Q. In addition to these potatoes, do you handle potatoes you purchase from other growers not members of the association?

(Testimony of Farrel L. Hansen.)

A. We do not purchase them; we handle them.

Q. Are they handled on the same basis as those of the members?

A. Yes, sir.

Q. In addition to those, do you buy any potatoes from other dealers in carload lots?

A. We don't. We handle those, also.

Q. Is it your testimony then that the method of handling [108] all of these potatoes is identical regardless of where they are secured?

A. Well, there is some differences in the labor or services performed, but when we handle,—or, say, we make a commitment on a car of potatoes from another dealer, those potatoes go through our organization on the same relative basis as any grower's potatoes.

Q. When you make such an arrangement do you agree with the dealer on the price he is to receive for the potatoes?

A. Yes, sir; just the same as we do with the growers.

Q. And that price is paid to the dealer?

A. Yes, sir.

Q. Is there any deduction or charges made to the dealer in that type of arrangement?

A. It depends on the incidents surrounding the transaction. In most cases the deductions are identical, when the price is arrived at.

Q. So that, in that case the transaction amounts to the same as an outright purchase by the association of the potatoes of the dealer?

A. Well, no; there is a little difference.

(Testimony of Farrel L. Hansen.)

Q. What is the difference?

A. In the cooperative arrangement, and the co-operative method of handling merchandise there is an over all participation in the activities, in the proceeds, or the losses [109] incident to a marketing operation. In our operations I, myself, am nothing more or less than a hired man of the farmer, or whoever uses the services which our organization provides. There are certain estimated revenues or retains made by the board of directors to cover the expenses incident to our marketing operations. At the end of the season if our retains are not all used, then any credits remaining are pro-rated back to everyone, including dealers.

Q. To everyone whose potatoes you handle?

A. Absolutely. They get a proportionate refund, or a per hundredweight credit at the end of the season.

Q. Let's discuss the nature of the arrangement between you and the members of the association whose potatoes you handle.

A. O. K.

Q. Do you have any agreement with those members under which they are obligated to sell all of their potatoes to the association?

A. No, we don't cover that.

Q. Do you enter into any sort of a written agreement of purchase, or marketing agreement with the members?

A. We have a membership contract between the association and the members; yes. [110]

Q. Do you enter into any kind of a written agree-

(Testimony of Farrel L. Hansen.)

ment at the time you handle his potatoes, at the time his potatoes are sent to the warehouse?

A. No, sir.

Q. What is the nature of the arrangement that is worked out at that time?

A. Well, it is verbal. Through contacts with the buying trade we receive offers on potatoes, and those offers are transmitted to the growers for their acceptance or refusal.

Q. How are they transmitted?

A. By word of mouth.

Q. At the time the association discusses with the grower the manner of handling his potatoes is the price he is to receive agreed upon?

A. It is estimated.

Q. It is estimated? A. Yes, sir.

Q. Which would be the ordinary market price less costs? [111]

A. Approximately so; yes.

Q. At that time do you immediately undertake to handle his potatoes? A. Yes, sir.

Q. And is the same arrangement true as to non members? A. Yes, sir.

Q. Any difference there at all?

A. Practically none; no. It goes through the same procedure.

Q. Then at that time do you send sorting crews to the cellar to sort and handle the potatoes?

A. In some instances; yes.

Q. In what instances don't you do that?

(Testimony of Farrel L. Hansen.)

A. It depends on what the farmer himself wants to do. In other words, they are his potatoes, and I am working for him, just like anybody else, and if he wants to sort those potatoes himself, well, he gets the order and loads them on the car. If he wants me to rustle his crew for him and send them out to his farm, I do that. If he wants to pay for them with his own check, he can do that, or if he wants me to deduct it out of the potatoes and pay them, I do that.

Q. You agree at the time how they are going to be handled, whether he is going to pack them and ship them and handle them, or whether your crew is going to handle them? A. That is right [112]

Q. Or it is agreed that your crew is going to do it?

A. What do you mean by "my crew?"

Q. The crew of the farmers' association?

A. That is correct.

Q. In most instances that is the way it is actually handled, isn't that correct, in a great majority of the cases?

A. I wouldn't say a great majority of the cases. We have quite a wide variation in the actual occurrence of our marketing or grading operations. We have the farmer helping from furnishing one man to the whole crew. In some instances the farmers don't have anything to do with it; they turn it all over to my management.

Q. That would be in the great majority of cases?

A. I would say not the great majority of cases.

(Testimony of Farrel L. Hansen.)

The growers themselves would participate in and of themselves in most cases.

Q. What do you mean by "participate?" Actually help with the sorting? A. Yes, sir.

Q. The farmer himself?

A. The farmer himself, or the farmer's hired man, or trading help, one farmer with another. Very, very few farmers in the cellar that don't at least furnish one man or himself, on the crew.

Q. You mean by that they are present in the cellar to [113] watch the work being done, or do they actually participate in the work?

A. Actually participate in the work.

Q. In that instance you pay that particular person, whether it is the person himself, or the hired hand? A. He pays himself.

Q. How is the bookkeeping handled so that proper credit is made on that?

A. We just send him the number of men he thinks he needs to get the job done.

Q. And charge him for that labor?

A. And we deduct from his settlement the wages of the boys that he doesn't pay. I have had many cases where crews, entire crews have gone out from the warehouse where the farmer paid it all, with his own check.

Q. The work done in the cellar on the potatoes by the sorting crew is substantially as described by Mr. Tauby in respect to his operations?

A. Well, I think it would be; yes, as I got his testimony.

(Testimony of Farrel L. Hansen.)

Q. Is there a rough sort, or a scalp sort sometimes made? A. Yes, sir.

Q. What does "scalp" mean?

A. That is an operation in a farmer's cellar at which time the grade of U. S. No. 1 or U. S. No. 2 is not made. It is more of a hurried pack, and all of the culls are not taken [114] out, and a complete separation of the No 1's and No. 2's are not made.

Q. In those cases there would be further sorting made in the warehouse later?

A. That is correct.

Q. How often does that happen, that is, that there is scalp sorting made?

A. That varies considerably. In some cases it is a majority, and in other cases it would be a minority of times. It depends on the season, and on the demand, and then the particular growers you might be dealing with.

Q. In other cases there is a more careful sorting made of the No. 1's and 2's, and the culls removed, is that correct?

A. You are speaking now of in the country?

Q. In the country; in the cellar of the farmer?

A. That is correct.

Q. In those instances, sometimes the potatoes are taken directly from the cellar to the cars and shipped, is that correct? A. That is correct.

Q. Or to the warehouse for storage?

A. That is correct.

Q. Before shipment?

A. That is correct. [115]

(Testimony of Farrel L. Hansen.)

Q. In other words, in some instances there is a washing process in the warehouse and a further sorting?

A. That is correct.

Q. Are you able to estimate the percentage of the potatoes shipped by your association during the last season which were washed in terms of one hundred pounds by weight?

A. Well, it would be a guess. It would take a lot of study to go through our records to make an accurate determination in that respect.

Trial Examiner Barton: Can you approximate it?

A. Yes; I believe I could approximate it as fifty per cent.

Q. Isn't it true there has been quite a big point made by the shippers of the Idaho Falls potatoes because in many cases they are washed? Isn't that a selling point for potatoes in this area?

A. Not to my knowledge. I think with washing they are inferior.

Q. Is that true?

A. To my positive information they are inferior if they are washed.

Q. How many plants or warehouses does your association operate, Mr. Hansen?

A. Four.

Q. And in addition to the ones at Idaho Falls and Shelley where are the others located? [116]

A. At Blackfoot and at Burley.

Q. And where is Burley from Idaho Falls?

A. About one hundred thirty-five miles, southwest.

(Testimony of Farrel L. Hansen.)

Q. And approximately how far is Blackfoot from Idaho Falls?

A. About twenty-five miles south.

Q. Are all of these plants under your supervision?

A. Yes, sir.

Q. You have local managers, or superintendents, in the plants?

A. Yes, sir.

Q. You exercise a more direct control over the Shelley and Idaho Falls plants than the other two, do you not?

A. No, sir.

Q. Where do you spend most of your time?

A. In Idaho Falls.

Q. And do you personally take part in the operation of the warehouse at Idaho Falls?

A. Well, in a supervisory way; yes. My time is devoted to selling. I sell merchandise, sell potatoes; I answer wires and correspondence for all four branches, and the details incident to the warehouse operations necessarily have to be taken care of by someone else. I have full and over-all supervision. Naturally that comes under my direction.

Q. Who is the foreman at the Idaho Falls warehouse? [117]

A. Mr. Strong, Mr. N. G. Strong.

Q. Does he also act as buyer? Did he at one time?

A. We don't have any buyers; he is field man.

Q. Field man. Mr. Forman is also employed in the Idaho Falls warehouse?

A. No, sir.

Q. He was employed last season?

A. Yes, sir.

(Testimony of Farrel L. Hansen.)

Q. What was his position?

A. He was foreman of the Idaho Falls warehouse.

Trial Examiner Barton: What was his name?

A. Fred Forman.

Q. F-o-r-m-a-n? A. Yes, sir.

Q. How many crews, cellar crews, do you operate at the Idaho Falls plant?

A. That varies a great deal.

Q. What is the range?

A. From one to eight.

Q. What about the Shelley plant?

A. Well, from one to three.

Q. Do you interchange employees between Idaho Falls and Shelley?

A. Occasionally, but not often.

Q. What was the name of the foreman in the Shelley operation last year?

A. Paul Blalock.

Q. To continue further with the arrangement between the farmer and the association, will you explain just in what respects it differs, if any, from the type of arrangement that exists with private shippers,—the ordinary shipper?

A. Well, I would say that the difference basically is that the cooperative is strictly non-profit. When you analyze that you must necessarily realize that any accumulated credit or excess retained that is taken for services performed must be pro-rated back to the growers at the end of the season. That is what is done. I think, basically, that is the difference

(Testimony of Farrel L. Hansen.)

between a cooperative organization and a private enterprise.

Q. It makes settlement with the growers than at the end of the season, is that the situation?

A. Well, really final settlement is made at the **end of the season**. Prior to that time it is estimated settlement.

Q. The farmer,—the grower receives for his potatoes the price actually paid for them by the buyer, whoever it is, less the cost of labor in handling them and certain estimated overhead costs?

A. That is right. That is correct.

Q. Is that true of all types of packs? [119]

A. Yes, sir.

Q. What has been the practice of the association with respect to reemployment of employees on their cellar and warehouse crews from season to season? By that I mean, have you attempted to employ old workers so far as possible at the start of the season?

A. Yes; since I have been over there as manager I have taken quite a bit of pain in trying to build up a good personnel and employees' relations and *encourage* those who are qualified and capable to continue with the organization. That has been my policy.

Q. And have you had considerable continuity of crews there from season to season?

A. Up until last year he have had.

Q. It is true that this year there are some unusual factors which affect that problem which didn't exist before, is it not?

A. Yes, sir.

(Testimony of Farrel L. Hansen.)

Q. Such as war and development of defense works?

A. Well, I think,—at least I was told there were some cases where agents of war industries had sent a delegation up here to induce laborers from this area to go into defense work.

Q. What has been the experience of the association this year with respect to the percentage of their old employees [120] that returned?

A. Well, I would imagine, based upon previous years, twenty-five to thirty-five per cent.

Q. That is the percentage that has returned this year as compared with previous years, is that correct? A. Yes, sir.

Q. And in previous years that percentage was substantially higher? A. Yes, sir.

Q. How much higher, would you say?

A. Oh, it would double that, fifty to seventy-five per cent in other years.

Q. I was attempting to speak only of the Idaho Falls and Shelley warehouses. Is that a correct statement for those two warehouses?

A. I think that is true. However, that is an off-hand guess. I haven't gone into that in detail, but the war, the enlistments and the draft has taken a lot, and high wages in the defense areas have also attracted a lot of our best men until we have lost them, and we are having to substitute with women and less competent help. In fact, if they don't stop pretty soon, somebody is going to get hungry about next year and wonder where the food is coming from to feed the country.

(Testimony of Farrel L. Hansen.)

Q. The warehouse foreman has supervision over the country [121] crews as well as the warehouse crews? A. Yes, sir.

Q. Can you indicate the nature and extent of that supervision?

A. Well, just as any foreman would have. What, in detail, did you have in mind?

Q. Does he do hiring and firing for the country crews?

A. Yes, he could do that, but not exclusively however.

Q. Who else would participate in that?

A. I could.

Q. What about the country crew's foreman?

A. They could hire and fire.

Q. Is the work in your operations the same as Mr. Taube testified to in his testimony?

A. I believe it was, with the exception the men we put in charge of the country crew can hire and fire men.

Q. They can do it without consulting with you or with the warehouse foreman?

A. That is correct.

Q. They are generally the head grader man on the machine? A. Yes, sir.

Q. And they work with the men?

A. That is right. I might say that is not a customary occurrence, because, in fact, we don't have but very, very little turn-over in normal times, and if they have men who [122] are not competent, sometimes they will send him in with the truck and say,

(Testimony of Farrel L. Hansen.)

“See if you can’t use him in there someplace.” And if they have a chance to pick up a hired man in the country that is working for some farmer, they have done that in cases.

Q. They are responsible for the men on the crew to see that they do their work, and to report them if they don’t?

A. To a large extent, in connection with the farmer himself. I have found that the farmers take a very active interest in the performance of the men in their cellars.

Q. Just how frequently do you have complaints from farmers about the grading?

A. It depends on the crew. Some crews we don’t have any complaints about at all. Other crews we have constant complaints.

Q. How many complaints can you recall having been made this year?

A. Oh, we haven’t been in the country but about a week this year, so I don’t recall of a complaint that has been made.

Q. How many did you have last year?

A. Oh,—

Q. That you can recall?

A. We had quite a lot.

Q. In those cases the complaint is, I take it, that the [123] grading isn’t proper, is that right?

A. Or they feel that the men are not doing their share of the work. In other words, when you send a crew of men out it may be that you will get one that is inefficient, or careless, or does a lot of horse

(Testimony of Farrel L. Hansen.)

play, and that money comes right out of the farmer's pocket, and he is prone to criticize the balance of the crew.

Q. Ordinarily, isn't it true when a complaint is made to the crew foreman, or somebody in the office, first an attempt is made to work that out with the farmer and satisfy him?

A. That is what we do,—not only first, but last, too.

Q. And you can ordinarily do that, isn't that true?

A. Sometimes, when we get complaints too often, we have to switch men and transfer them from maybe one crew to another.

Q. How often does that happen?

A. Oh, I would say just intermittently. There is no specific time. You might run into a period of time when you get along just fine.

Q. How many times has it happened this year?

A. This year so far we haven't had it occur.

Q. How many men did you transfer last year at the request of any farmers?

A. That would be a very, very indefinite guess on my part. [124]

Q. Can you recall of any particular instances when it was necessary to do that?

A. I couldn't give you the dates of it, but it has been many times when that has occurred, when we transferred men.

A. As many as ten times last year?

A. No. One hundred and fifty times. In other

(Testimony of Farrel L. Hansen.)

words, we will get suggestions from the growers themselves as to how the men could be placed to better advantage. I have had,—I often get, and constantly get, suggestions from the growers as to how these crews could be better organized and handled.

Q. Can you give us the names of some of the employees who last year were transferred from one crew to another at the request of the farmers?

A. Not offhand; no.

Q. Did you have any instance last season when any employee was discharged at the request of a farmer?

A. I don't recall of one offhand. We try to avoid that, wherever possible.

Q. The farmer would have no power to discharge any member of a crew, is that correct?

A. I would say he did.

Q. He could himself tell a crew member he is through?

A. Yes, sir.

Q. But you don't recall of any occasion last year when [125] that happened?

A. Not specifically right now. I think there was a couple of times when they sent one or two back to town.

Q. And they were transferred to other crews?

A. Yes, sir.

Q. Not actually discharged?

A. No. But I don't think you understand the authority of the farmers in that organization. It belongs to them, and if they decided there was some-

(Testimony of Farrel L. Hansen.)

body there that didn't belong there, they would have the authority to,—[126]

Q. The individual employee, it is very seldom a farmer insists on an individual employee being removed from the crew, is it not?

A. Yes, I would say it is seldom he insists that he be removed from the crew. However, he will suggest quite often that he be changed to another job, or crew.

Q. It is also seldom they insist on having a whole new crew? Is that true?

A. That is correct.

Q. On the crews themselves the men do rotate back and forth to some extent on the job?

A. Yes, sir. [127]

Q. And the crew foreman himself has them do that? A. I think that is correct.

Q. They cooperate together in the handling of potatoes, do they not? A. That is correct.

Q. Before you become connected with the association were you in the produce business yourself?

A. Yes, sir.

Q. How much experience had you had in the produce business?

A. Well, I have been,—prior to the time I went over there as manager I was in the farming and shipping business for about fifteen years.

Q. Are you familiar with the operations of the other companies that are named in the complaint in this case?

(Testimony of Farrel L. Hansen.)

A. Well, in a general way, I think I would be.

Q. Do you know whether the work the employees of those companies do is substantially the same as you have described for yours?

A. You mean insofar as it concerns what?

Q. The work the men employed by the company do,—the actual work they do?

A. Yes; I think it is very comparable.

Q. In your warehouses you have,—you also have your sorting table and sorting crew, in your warehouses, is that correct? [128]

A. Yes, sir.

Q. In addition, do you have some additional employees, warehouse employees who do not work on the sorting crew, or work only part time on the sorting crew?

A. Yes, sir.

Q. Such as car loaders and employees of that kind?

A. That is right.

Q. Do you have any other supervisors in your warehouses beside the foreman?

A. Well, we have some different lines of work done by individuals. All work incident to the warehouse is not grading on the tables.

Q. I understand, but do you have any other supervisory employees besides the foreman,—any assistant foreman?

A. Yes; we have an assistant foreman.

Q. In the Idaho Falls plant?

A. Yes, sir

Q. What is his name?

A. Lester Long.

Q. Was he there last season, too?

A. Yes, sir.

(Testimony of Farrel L. Hansen.)

Q. Do you have any in Shelley?

A. He has a little different arrangement there. The branch bookkeeper is also assistant foreman, in that case.

Q. I wonder, Mr. Hansen, if you are able at this time to [129] give me the approximate quantity of your shipments for last season, for the Idaho Falls and Shelley operations, or for the association as a whole?

A. I could give it to you for the association as a whole in carloads. Is that the way you want it?

Q. Yes.

A. It is approximately twenty-five hundred carloads.

Q. Is that figured on the basis of the fiscal year, July to July, or how do you figure it?

A. Yes, sir.

Q. What percentage of these shipments were shipped outside of the state of Idaho, approximately?

A. I would say practically all of them, between ninety-five and ninety-eight per cent.

Trial Examiner Barton: Do they go to any one part of the country more than another?

A. Oh, really, no. They really get a very wide distribution.

Q. Do you have any contracts directly with any agency of the Government for potatoes?

A. We don't have any existing at the present time. I have one pending.

Q. Have you during the past season sold to agencies of the Federal Government?

(Testimony of Farrel L. Hansen.)

A. Oh, yes; the army. [130]

Q. Approximately what percentage of the twenty-five hundred carloads came from the Idaho Falls and Shelley plants?

A. Oh, let me see,—I would say fifty per cent, or just a little more than fifty per cent came from the two places.

Q. The Idaho Falls plant is the bigger?

A. That is right.

Q. You also operate transports of your own in Interstate Commerce for the transportation of potatoes,—transport trucks? A. Yes, sir.

Q. How many of those do you have?

A. One.

Q. Do you do most of the trucking from the cellars to the warehouses by association trucks?

A. Oh, I would imagine we would perhaps do a little more than fifty per cent.

Q. And the balance is done by whom?

A. The farmers, or some private trucks they have arranged for.

Trial Examiner Barton: I suppose when you do the trucking that is just charged against what the farmer gets? Is that the situation?

A. Yes; that is right. The farmer owns the trucks, really, and there, again, we estimate what it costs us to haul from the farmer's cellar to the car or to the warehouse, and then [131] if we don't use what we charge him for that, or deduct from his potatoes for it, the balance is refunded to him at the end of the season.

(Testimony of Farrel L. Hansen.)

Trial Examiner Barton: Now, when you ship to buyers outside of the state, as I understand it, they settle with the association, and the association, in turn, settles with the growers?

A. That is right. We make a retain there to cover our costs and in-transit risks, and if our retains are more than what our actual expense is, then the credit at the end of the season is prorated back to the growers on a tonnage basis.

Q. (By Mr. Babcock): In the case of the handling of potatoes for non-members, do you charge them with the same estimated overhead costs as you do your members?

A. Yes, sir; they are subjected to the same procedure.

Q. What advantage is there then to being a member of the association and having potatoes handled through the association?

A. There really isn't very much, other than the active members of the association have the first call on the services that are there.

Q. I see. If there isn't the facilities to handle any more, then you don't handle the potatoes of the non members? Is that correct? [132]

A. That is correct.

Q. The members also participate in the meetings, and have a right to vote?

A. That is correct. That is another advantage they have.

Q. Would you be able to estimate the percentage

(Testimony of Farrel L. Hansen.)

of potatoes you handled which belonged to members, and potatoes which did not, say for last season?

A. I would imagine it is about ninety per cent member business, and ten per cent non-member business.

Q. Have you compiled any statistics on that subject? A. No; I haven't.

Q. Or any summary?

A. Our records over there would indicate it.

Q. You have no summary prepared which would show that readily? A. No, I don't. [133]

Redirect Examination

Q. (By Mr. Babcock): Mr. Hansen, it is my understanding in the instances where the farmer paid the crew, that was in the case of crews you picked up, or crews you sent out, but not your regular crews. Is that correct?

A. That is not correct.

Q. Sometimes they pay your regular crews when they are working in their cellar?

A. Yes, sir; some prefer to pay with their own check rather than have it deducted from their account-sale, and I don't want to create the impression that all of the growers are laying men off, or transferring them, but I do want to tell [135] you that growers exercise interest in the crews constantly, and I do get constant suggestions and recommendations from them as to where they think the men can perform the most efficiently.

Trial Examiner Barton: Do you always follow those suggestions or recommendations?

(Testimony of Farrel L. Hansen.)

A. I would say in a large majority of the cases I do. I have found it to be very helpful and constructive.

Trial Examiner Barton: But in some instances you don't follow it?

A. In some instances I find they are wrong.

Q. I will ask you now, Mr. Hansen, who has the power to decide what action to take in any particular matter?

A. The farmer is the boss. He is my boss. If I don't do what he says, I am not there, and that applies to every man and woman in the organization.

Mr. Babcock: That is all.

Recross Examination

Q. (By Mr. Weston): I would like to develop a little further the difference between your operation as compared with others on paying for or charging for the crew. Do I understand you claim under your association set-up the exact charge for packing the crop is charged against the individual farmer?

A. Yes, sir; that is correct. [136]

Q. That is, the total amount you pay for that labor is charged against him directly?

A. That is correct.

Q. Now these potatoes that are packed by you either in the shed or on the farm, who owns those potatoes until they are shipped, or delivered to the buyer?

A. The farmer absolutely owns them until they are accepted by the buyer.

Q. So he owns them all that time?

(Testimony of Farrel L. Hansen.)

A. Yes, sir. I might illustrate further, if you like, if a sale is made and later rejected and a reduced price is experienced, that is charged back to the growers on a pro-rata basis.

Mr. Weston: I believe that is all I have.

Redirect Examination

Q. (By Mr. Babcock): What do you mean by "on a pro-rata basis?" Do you mean for a particular shipment to be charged back to the farmer whose particular potatoes made up that shipment?

A. I mean for the total shipments for the season, as a whole.

Q. They are charged back to all of the farmers who have made sales in proportion to the amount of potatoes they have sold?

A. The retain the directors have instructed me to take out from the account—sale to the grower covers,—or is supposed [137] to cover that portion of our expenses, and that is where it is charged, so that grower, along with all others, unless it could be shown the individual grower has an individual responsibility, or a failure to deliver what he agreed to deliver,—

Q. That would be extremely difficult, wouldn't it? Isn't the identity of the ownership of these potatoes lost once they are in the box car?

A. No, sir.

Q. How is that identity kept?

A. We keep track of every man's potatoes that goes into every car, and every sack of potatoes that goes through there.

(Testimony of Farrel L. Hansen.)

Q. As a matter of practice, the individual grower whose potatoes did not measure up to specifications is not charged the whole amount of the loss, is he? It is pro-rated?

A. Not unless he would fail to come up to the stipulations of the sale. For example, if you are a grower out here and I have an order for U. S. No. 1's; I submit that order to you for your acceptance, and you accept it, and we get a U. S. No. 1 certificate on them and they are loaded on the car. Now in transit the shipment might freeze. That is not your fault individually. That is a cause beyond your or my control, so any loss incident to that damage is taken out of this retain fund and is prorated to each member in [138] the association.

Q. The potatoes are always inspected as they are put into the cars, or before they are put into the cars? Is that correct?

A. Yes; we take inspection on everything.

Q. Inspection is made before the time the car leaves the plant?

A. Yes, sir.

Q. Now, how is the identity of these particular potatoes, the name of the owner or grower, maintained after that?

A. If we make a deal with you on a car of potatoes, give you an order and you accept it, we have our books which show that Mr. Babcock delivered so many potatoes, and they are given a lot number, and put in such and such a car, and if something happens to that car we know exactly whose potatoes they are.

(Testimony of Farrel L. Hansen.)

Q. Sometimes you ship mixed cars, do you not?

A. Yes; quite often.

Q. Upon the same order?

A. Yes, sir. [139]

A. G. STANGER,

called as a witness by and on behalf of the Board,
being first duly sworn, was examined and testified
as follows:

Direct Examination

Trial Examiner Barton: State your full name,
please.

A. A. G. Stanger.

Q. (By Mr. Penfield): What is your address,
Mr. Stanger? A. Idaho Falls, Idaho.

Q. What is your business or occupation?

A. Well, in this particular case, I suppose you
want it connected with the potato business. I am
manager of the Idaho Falls Bonded Warehouse
Company.

Q. Is the Idaho Falls Bonded Warehouse Com-
pany,—what is the correct name of that company?

A. Idaho Falls Warehouse Company, Incorpo-
rated, is the [142] correct name. The “Bonded,”
has been inserted, simply because we are bonded,
both by the State and by the Federal Government,
and it has been associated with the name, and so
we call it that.

Q. The correct name is as it is in the complaint?

A. Yes, sir.

(Testimony of A. G. Stanger.)

Q. When was this corporation formed?

A. In 1919.

Trial Examiner Barton: Do you use the letters "Inc." or "Incorporated?"

A. No; just "company."

Trial Examiner Barton: All right.

Q. In what state is it incorporated?

A. Idaho.

Q. Are you an officer of the corporation at the present time? A. Yes, sir.

Q. Who are the other officers?

A. A. E. Stanger is president; Glen Stanger is vice-president; I am secretary-treasurer and manager.

Q. These gentlemen that you mentioned, are they all related to you? A. That is right?

Q. Brothers?

A. A. E. is my father; the other two are brothers. [143]

Q. Is this corporation wholly owned by your brothers and father? A. Yes, sir.

Q. There are no other stockholders?

A. Yes; I have one sister.

Q. One sister? A. Yes, sir.

Q. It is entirely owned by the family?

A. That is right.

Q. And was that true at the time of the incorporation? A. No, sir.

Q. I believe your initials are A. G. Stanger,—are you commonly known as Bert Stanger?

A. That is right.

(Testimony of A. G. Stanger.)

Q. For how long has this corporation been wholly owned by members of your family?

A. I can't give you the exact date, but it would be,—I would have to look at the record.

Q. I don't care about that,—just approximately?

A. Oh, approximately ten years.

Q. Approximately ten years. And what is the business of the corporation?

A. It consists of the storing of household goods, storing of produce, storing of wool, handling and selling of coal, and handling and selling of fertilizer, feeds, stokers, heat- [144] ing equipment, installation equipment,—I don't know whether I have skipped anything or not.

Q. You didn't mention potatoes?

A. I mentioned "produce," didn't I?

Q. Are potatoes the produce you handle?

A. Yes, sir.

Q. Now, in connection with your handling of potatoes, is your business conducted, that is, do the employees do work in a similar manner to which Mr. C. R. Holden and Mr. Hansen described?

A. Yes, the produce business is handled in that fashion as described by the previous witnesses.

Q. I mean by that,—I am limiting it to the fact you have country crews and have a warehouse crew and do washing and those sorts of things?

A. Yes, sir.

Q. Now, do the members of your family who own the corporation also grow potatoes?

A. That is right; we do.

(Testimony of A. G. Stanger.)

Q. And does the corporation handle and ship the potatoes grown by members of the family?

A. That is correct.

Q. All of the potatoes grown by them?

A. Not all of them, because some of them are taken to the flour mill by the trucks from the farms, and so forth, and [145] in that particular case they wouldn't, but in the most part the potatoes are handled for the family.

Q. Now, does the corporation have some special arrangement in handling the potatoes of the family that is distinguished from the handling of potatoes of other growers?

A. That is correct. The potatoes from the family are handled in very much the same fashion as described by Mr. Hansen for the Potato Growers Association; in other words they are turned over to us to handle. Do you want me to,—

Q. Go ahead.

A. They are turned over to us to handle, and after the sales have been consummated and the returns made, then, of course, the individuals are given credit for the potatoes minus delivery charges, trucking charges, sack charges, and so forth.

Q. And that includes the sorting charges?

A. That is right.

Q. Then on each individual shipment you have from a member of the family you keep an account, a separate account of the costs of sorting, the sacking and everything?

(Testimony of A. G. Stanger.)

A. That is correct, and in some cases, depending on the season and on how busy we are, members of the family may sort up their potatoes, rough them over, and bring them in in order to help facilitate the labor situation, because in each case we have on these various farms men who may, or [146] may not be, busy at certain particular times, and if they are not busy feeding cattle or handling livestock, they can sort the potatoes up roughly and bring them in.

Q. In that instance there will be work done on the potatoes at the warehouse,—there will be another sorting at the warehouse before they are finally packed, is that right?

A. There will be in some cases. However, in other cases in which the potatoes may be packed dry, they will be packed by those men who are employed on the farms throughout the year, and then trucked in and loaded immediately into the car.

Q. In those instances your country crews don't handle them at all? A. No.

Q. Now, could you estimate about what percentage of the total amount of your family's potatoes that you handle there will be handled in this manner, as distinguished from having your country crews work on them?

A. That is hard to do, because of the existing circumstances that have taken place at the time the potatoes move.

Q. I realize that, but what I had in mind, is it an unusually large percentage, or a comparatively small percentage?

(Testimony of A. G. Stanger.)

A. Oh, I would say, roughly,—and it is merely a guess because I would have to go to the record,—I would say possibly not over twenty-five per cent are handled by the boys that [147] work on the farm the year round.

Q. And the remainder will be handled by your crews?
A. Yes, sir.

Q. When those crews go out to handle your family's potatoes, their salaries will be paid by the company? Is that right?

A. Paid by the company and then charged against the members of the family.

Q. Now, are the balance of the potatoes you handle and ship handled in a manner similar to that described by Mr. Lloyd Holden?

A. Some potatoes we buy loaded from other dealers.

Q. Those are carload lots?

A. Carload lots; yes, sir.

Q. Let's limit it to the potatoes which are packed by your employees?

A. Very similar to the manner which was described by the other witnesses, except in some cases we have growers who turn their potatoes over to us to handle, and we merely handle them for those growers, charging up the labor, the trucking, and so forth, to them, and handle them on a percentage basis; in other words, they pay us so much a car for the handling of them.

Q. Now, is that,—how does that arrangement differ from the one you have with the members of the family?

(Testimony of A. G. Stanger.)

A. Well, only in this respect: We charge the individual [148] for the services rendered, where we don't the family.

Q. What do you mean by,—you charge the family,—

Mr. Penfield: I will withdraw the question.

Q. I thought you said that you charged against the price for your family?

A. I meant over and above the cost.

Q. Oh, I see.

A. In other words, we wouldn't operate for everybody and do it just at cost, because we couldn't pay taxes.

Q. The difference in the handling then is that you make a profit out of it?

A. A little profit.

Q. Can you explain,—can you give us,—the remainder are made under a direct purchase arrangement with the individual grower?

A. That is correct.

Q. In substantially the same manner?

A. Yes, sir.

Q. Can you give us the approximate percentages for last year of the entire potatoes that you handled and shipped, that were shipped, first, by the members of your family?

A. I couldn't give that to you exact there; it would be approximate, because it varies each year, but I would say that possibly last year, fifteen per cent.

(Testimony of A. G. Stanger.)

Q. About fifteen per cent. And that might vary from fifteen [149] per cent up to what?

A. Up to thirty-five per cent.

Q. Then what would be the percentage that you handled under this arrangement you have previously explained?

A. That wouldn't run over five per cent, I don't think,—five to ten per cent.

Q. And the balance then will be purchased directly from the grower and packed by him?

A. That is correct.

Q. Now, during the past year approximately how many carloads did the company ship?

A. It would be in the neighborhood of about seven hundred.

Q. About seven hundred? A. Yes, sir.

Q. And approximately what percentage of these were shipped outside of the state of Idaho?

A. Well, practically all of them went outside of the state. Some were sold on an f. o. b. basis, but even if they were sold here, they moved outside of the state. I can't give you the percentage that was sold outside of the state.

Q. Would about ninety per cent go outside of the state?

A. I think it would be somewhere around there, any way.

Q. What percentage of your shipments, these seven hundred cars, were carload lots, as distinguished from potatoes you had handled and packed?

(Testimony of A. G. Stanger.)

A. I don't understand your question.

Q. Well, I understood you to state that you also purchased some potatoes in carload lots?

A. Oh, I see.

Q. That you don't pack and handle at all?

A. It would be merely a guess, because I can't say.

Q. Well, approximately of the seven hundred cars?

A. I would say possibly twenty-five per cent were packed by other packers.

Q. And your employees didn't handle them at all?

A. Our employees didn't handle them; no.

Q. Of those that were packed by you, am I correct in this: Like the other shippers some of the potatoes will be rough-sorted in the cellar and sent in for further sorting in the warehouse, while others will have the grade made in the cellar, and will be shipped directly? A. That is correct.

Q. Can you give me an idea of about what percentage will be rough-sorted and sent in, as compared with those that are graded and finally shipped?

A. Well, I would have to estimate it, and it may not be right. I would say that possibly sixty per cent, or better, were brought in.

Q. Were brought in rough-sorted?

A. Yes, sir. [151]

Q. And the remainder would be graded in the cellar?

A. That is correct. Last year was an especially

(Testimony of A. G. Stanger.)

bad year, and many of these potatoes had to be washed before they would pass inspection.

Q. And that matter of handling will vary from year to year and is usually a matter of agreement between the grower and the particular,—and the shipper, which in your case is the company?

A. Yes, sir; that is right.

Mr. Penfield: What I want to bring out is, he had [152] gone into the question that in case of the potatoes produced by the family, some were packed on the farm and not by the crews, and I want to find out what is the situation with respect to the remaining potatoes. Are some of them packed,—or sorted, rather, then by your crew?

A. In other words, do we buy potatoes from growers, and the growers pack the potatoes for us?

Q. Yes. A. Yes; we do that.

Q. About what percentage?

A. I can't estimate that offhand. I haven't any idea without going into the records.

Trial Examiner Barton: Would it be as much as fifty per cent?

A. No; last year I doubt if it run over fifteen per cent, [153] because of the condition of the potatoes.

Q. (By Mr. Penfield): While it might run higher in some years, generally speaking the majority will be packed by your own crews, is that correct?

A. I would say that is correct. However, if

(Testimony of A. G. Stanger.)

our labor situation changes much, they will all be packed by the growers.

Q. (By Mr. Penfield): Mr. Stanger, do you recall a farmer's meeting at,—a meeting that was held at the city hall on or about February 24th,—January 24th, 1942, at which employees were asked within?

A. Well, I recall something of a meeting,—in fact there [154] were quite a few held, I think. I wasn't at the meeting,—I don't know what took place, and whether or not that happens to be the exact date, I don't know.

Q. Did you attend a meeting among shippers and farmers on or about January 23rd, at the Bonneville Hotel at which it was agreed to call a meeting of the employees of the various potato houses and at which the shippers were requested to ask members of their,—representatives of their employees to attend the meeting?

A. Could I answer it this way, Mr. Penfield: I recall being at a meeting at the Bonneville Hotel. It was my understanding the meeting was called by Mr. Owens of the growers, and we were asked to attend, and I can't recall at that meeting whether or not there was to be a subsequent meeting of potato men or not.

Q. I think you have reference to a different meeting that was of a later date.

Mr. Weston: I think the meeting you are talking about was called at the city hall.

Mr. Penfield: I believe I said that.

(Testimony of A. G. Stanger.)

Trial Examiner Barton: You said at the Bonneville Hotel.

Mr. Penfield: The first meeting was a meeting at the city hall of the employees.

A. I don't recall the meeting. The only meeting I attended [155] was a meeting held at the Bonneville Hotel.

Q. Did you ever instruct any of your employees, or did you ever select any members of your employees to attend a meeting which was held in the city hall?

A. Oh,—not to my knowledge. Our employees have always been given to understand that if they wanted to attend a meeting, that was their business; not ours. If they wanted to go, certainly that was their right.

Q. You have no recollection of a meeting held at the city hall which was attended by employees of each of the shippers?

A. I haven't any recollection of it. There might have been a meeting there and possibly some of the men might have attended,—I don't recall.

Q. You never selected, or asked your employees to select any representatives to attend any meeting? A. No. [156]

Mr. Babcock: Mr. Examiner we have several stipulations [162] which I will read into the record.

Trial Examiner Barton: All right. Proceed.

Mr. Babcock: It is hereby stipulated that if the following named respondents and representatives of respondents were called as witnesses at this hear-

ing they would testify to the facts indicated below and that the statements of facts set forth below may be received into evidence to have the same force and effect as if they had been testified to during the hearing. The respondents referred to are W. P. Wilson, A. G. Stuart, George Peters, manager of S. Friedman and Sons; and Rowenah O'Neil. The respondents Wilson, Stuart, Peters and O'Neil in the purchase of potatoes from growers and in carload lots from other dealers make such purchases in substantially the same manner as respondents Taube and Holden. Purchases are made by oral agreement at an agreed price and are made either before sorting or after sorting by the growers. The work performed by the warehouse and country crews of these respondents is substantially the same as that performed by employees employed in similar work classifications by respondents Holden and Taube.

With respect to purchase prices paid to growers, the aforesaid Respondents in quoting prices make allowance for the estimated cost of sorting in those cases where the potatoes are purchased in bulk and the potatoes are to be sorted by Respondents' crews. The inspection made by the farmer or grower of the work being [163] done by the country crew in his cellar and the extent, if any, to which such farmer or grower supervises such work, as well as his relationship and dealings with the sorting crew and the crew foreman and those representatives of the respondents and fore-

men; are substantially the same for all Respondents named in the complaint, with the exception of Respondents Potato Growers and Respondent Traffic Association.

In all cases where the shipper purchases potatoes from the growers with the understanding that the shipper or dealer will do the sorting or packing with his own crew, some sort or grade is made in the grower's cellar, except in cases of potatoes handled field run.

Mr. Weston: Excuse me, but I would like to go back there, off the record.

Trial Examiner Barton: All right. Off the record.

(Discussion off the record.)

Mr. Babcock: What was the last few words, Mr. Reporter?

(Lines 8 to 11 incl. were read aloud by the Reporter.)

Mr. Babcock: In some instances this is the final sort or grade and thereafter potatoes are trucked to the railroad cars or warehouse of the dealer for storage preliminary to handling. In other cases only a preliminary sort is made in the cellar, the degree of thoroughness of the sort depending on the condition of the potatoes and other circumstances.

In this latter case, following the preliminary sort or grade, the potatoes are trucked to the warehouse and there [164] graded and, further, and packed, either washed or dry.

In addition to the above facts, the representatives of the above-named respondents or Respondents if called would testify further as follows:

That Respondent Wilson handles and sells potatoes grown by himself or grown by others and purchased by said Respondent. That during the season, during 1941-1942, between 10 and 15 per cent of the potatoes handled by Respondent Wilson were grown by him and the balance purchased from other growers or dealers. During said season said Respondent sold and shipped from his Firth, Idaho, his plant there, approximately 450 carloads of potatoes. Of this amount approximately 90 per cent was sold and shipped outside the State of Idaho. Approximately 50 per cent of the potatoes sorted and packed by the crews in the cellars of growers were further sorted in the warehouse of said Respondent.

George Peters is manager, the Idaho Falls manager of Respondent Friedman. Respondent Friedman does not own *or* plant at Idaho Falls, but does lease and operate an office in Idaho Falls and did during the potato season in 1941-1942 lease or operate a warehouse or plant in Idaho Falls. Respondent Friedman has its main office in Chicago, Illinois and is generally engaged in the produce business in various States. During the 1941-1942 potato season Respondent Friedman at the Idaho Falls plant or warehouse purchased, sorted, packed and [165] sold approximately 360 cars of potatoes, of which approximately 90 per cent were sold and

shipped to points outside of the State of Idaho. Since the opening of the 1942 season Respondent Friedman has bought, through its Idaho Falls office, carload lots of potatoes, which have already been sorted, packed and loaded. During the 1942-1943 season to date Respondent Friedman has not employed country or warehouse crews for the purpose of sorting and packing potatoes. At the present time it is not certain whether the Respondent Friedman will employ such crews during the 1942-1943 season.

During the 1941-1942 season none of the potatoes handled by Respondent Friedman in its Idaho Falls operation were grown by such Respondent during said season. All potatoes purchased by said Respondent from growers were sorted by crews of said Respondent. From 70 to 75 per cent of the potatoes sorted by crews of the Respondent in the cellars of growers were further sorted in said Respondent's warehouse before shipment.

Respondent Stuart, during the season 1941-1942 packed and shipped approximately 200 carloads of potatoes, approximately 95 per cent of which were sold and shipped to points outside of the State of Idaho. Approximately 5 per cent of the potatoes handled by said Respondent were grown by the Respondent. The remaining 95 per cent was purchased from growers. About 10 per cent of the potatoes purchased by Respondent Stuart [166] were sorted and packed by the growers from whom the purchases were made, the remainder were sorted and packed by Respondent Stuart. About 60 per

cent of the potatoes sorted and packed by Respondent Stuart were finally packed and sorted in the cellars of the growers, while a preliminary sort and pack was made with respect to the remainder in the cellars of such growers, and a further pack and sort is made in the warehouse of said Respondent.

Rowenah O'Neil is the duly appointed and acting administratrix of the estate of J. E. O'Neil, deceased; as administratrix she is carrying on the business of J. E. O'Neil in substantially the same manner as it was conducted by J. E. O'Neil. During the season 1941-1942 J. E. O'Neil sold and shipped 800 to 900 carloads of potatoes, of which, in excess of 90 per cent were sold and shipped outside the State of Idaho. During such season none of the potatoes handled by Respondent were grown by said Respondent. About 50 per cent of the potatoes handled by said O'Neil during said season were finally packed and sorted in the cellars of the growers by O'Neil's crews; the remainder of the potatoes were sorted and packed in the warehouse of Respondent O'Neil. During the 1942-1943 season to *day* between 10 and 15 per cent of the potatoes packed by Rowenah O'Neil, administratrix, were grown either by Rowenah O'Neil, administratrix or by her personally. [167]

Trial Examiner Barton: Does that complete the stipulation?

Mr. Babcock: One more paragraph. And it is further stipulated that this stipulation is without prejudice to the right of any party to introduce

further or additional testimony on any of the matters covered by the stipulation.

Trial Examiner Barton: We will go off the record and have the Reporter read the stipulation back to us and then we can make any corrections necessary.

(Whereupon, in an off-the-record discussion the foregoing stipulation was read back.)

Trial Examiner Barton: For the record, is the stipulation now as read back by the reporter agreeable?

Mr. Weston: Yes sir.

Trial Examiner Barton: Is it agreeable to the Board also?

Mr. Babcock: Yes sir. Will you mark these?

(Hands documents to reporter.)

(Whereupon, documents hereinabove referred to were marked as Board's Exhibits 3 to 10 inclusive for identification.)

Mr. Babcock: I offer in evidence what has been marked for identification,—what have been marked for identification as Board's Exhibits numbers 3 to 10 inclusive, which are payroll lists or employees of the respondents at various payroll dates and periods; during February 1942, and in some instances [168] including payrolls in April. I offer these with the understanding that Mr. Weston is willing to stipulate that these are correct as lists of the employees of these Respondents in the units alleged in the complaint to be appropriate during the periods or on the date indicated on the lists.

Trial Examiner Barton: Is that correct Mr. Weston?

Mr. Weston: Yes, that is correct; yes, that is correct, with the further understanding I believe that Mr. Babcock is going to allow Mr. Stuart to submit an additional list of the employees showing more common employee record.

Mr. Babcock: That is correct. Mr. Stuart asked if he could submit such a list.

Trial Examiner Barton: All right. Board's Exhibits 3 to 10 inclusive are admitted in evidence.

(Whereupon, documents heretofore referred to marked as Board's Exhibit 3 to 10 incl. for identification were received in evidence.) [169]

BOARD'S EXHIBIT NO. 3

(Copy)

PAYROLL

No. 1

Idaho Falls Potato Growers, Inc., Idaho Falls, Idaho

From Feb. 6 to Feb. 12 Inc. 1942

Unskilled labor

Austin, Don

Bailey, George

Barr, Jess

Bates, Arvin

Bates, O. V.

Bates, Reed

Beach, A. W.

Berger, Alfred

Braegger, John

Briggs, Wayne

Broomhall, Harry

Burke, Newell

Butler, Dewey

Carlson, Vaughn

Carter, Earl

Cleverley, Parley

Clarke, Kent

Covert, Delbert

Depew, George

Desch, Dewey

(Copy)

PAYROLL

No. 2

Idaho Falls Potato Growers, Inc., Idaho Falls, Idaho

From Feb. 6 to Feb. 12, inc. 1942

Unskilled labor

Edwards, Clifford

Edwards, Ed.

Feeley, Marvin

Frandsen, Ray

Frandsen, Wardell

Gardner, Lawrence

Gardner, Lyle

Gallup, Dell

Galbraith, Bill

Goodwin, Max

Goodwin, Ron

Goldman, Warren

Glass, Royce

Haddon, Heber

Handy, Herman

Hansen, Jim

Harris, Charles

Harris, O.

Henderson, Cecil

Holm, Axel

Hudman, Jerome

(Copy)

PAYROLL

No. 3

Idaho Falls Potato Growers, Inc., Idaho Falls, Idaho

From Feb. 6 to Feb. 12, inc. 1942

Unskilled labor

Jensen, Austin

Jensen, Clint

Jones, Dell

Kingham, Dwain

Long, Lester

McEntire, Wayne

Morgon, Dale

Montague, Arthur

Mass, Ralph

Mussman, Vic

Neilsen, John

Nelson, Harold

Nielsen, LaVern

Narell, Claude

Narell, C. H.

Narell, E. H.

Oswald, Bill

Oswald, George

Oswald, Vic

Otteson, Dib

(Copy)

PAYROLL

No. 4

Idaho Falls Potato Growers, Inc., Idaho Falls, Idaho
From Feb. 6 to Feb. 12 inc. 1942

Unskilled labor

Phillips, J. R.

Rawson, Perry

Randall, Milt

Rash, Milo

Rush, Hugh

Ryder, Lloyd

Saeman, Emil

Sauers, Ed

Sauers, Harry

Schelt, Pete

Schofield, Joe

Shields, Rom

Steers, Elven

Steers, Rue

Taylor, Al

Tracey, Bert

Tracey, E. L.

Turner, Norman

Walquist, Art

Watson, D. E.

(Copy)

PAYROLL

No. 5

Idaho Falls Potato Growers, Inc., Idaho Falls, Idaho

From Feb. 6 to Feb. 12 inc. 1942

Unskilled labor

Watson, Dean

Watson, Max

White, Ted

Wilson, Geo. D.

Winder, V.

Winge, Carey

Yorgesen, Lloyd

(Copy)

PAYROLL

Idaho Falls Potato Growers, Inc., Shelley, Idaho

From Feb. 6 to Feb. 13, inc. 1942

Unskilled labor

Allen, Adrian

Belnap, L. R.

Belnap, Norman

Christensen, L.

Converse, Wm.

Davis, C.

Dodge, Gilbert

Fowler, Davon

Fowler, Leland

Godfrey, Earl

Goldman, Warren

Hult, Marvin

Johnson, Gerald

Johnson, James

Kotter, LeMar

Lafgren, Gus

McMurtrey, J. L.

Morris, H.

Owens, Reed

Richards, Elmo

No. 2

Robertson, Ivan

Simpson, Earl

Tracey, Les

BOARD'S EXHIBIT NO. 4

(Copy)

List of employees for pay-roll period next preceding
February 13, 1942, and job classifications.

Anderson, James LeRoy	Dumper	\$21.45
Armstrong, Ladd	Sorter Man	21.17
Armstrong, Read	Table Man	23.10
Beasley, Melvin	“	25.20
Beasley, William L.	“	21.77
Bradshaw, Sam	“	15.60
Brewington, Harold	“	10.80
Bronson, Wilmer	Jigger	15.60
Dye, Myron	Trucker	27.90
Fotheringham, Lawrence ..	Table Man	2.70
Frandsen, Cecil Burke	Sower	20.40
Hopkins, Bill	Scooper	20.35
Howell, Jesse	Table Man	19.18
Kellar, Vernal	Scooper	21.45
Lord, Joseph	Trucker	26.10
Lundquist, Moroni	Sower	15.60
Mitchell, Joseph	Table Man	15.60
Mitchell, Thomas James ..	“	5.20
Peterson, Roy O.	Scooper	2.10
Rambough, Frank	Sower	15.30
Seavers, Phillip B.	Car Loader	28.28
Smith, Marion	Jigger	10.80
Stoddard, James Keith	Sower	15.60
Stoddard, Ray	Dumper	15.60
Steffler, Edward	Cull man	22.55
Wernette, John	“	16.50

\$455.90

W. P. Wilson
P.O. Box 15
Firth, Idaho

BOARD'S EXHIBIT NO. 5

PAYROLL REPORT

L. S. TAUBE & CO., INC.

Francis Albertson	Ross Moore
Milton Ball	Wayne Montague
Alvin Ball	Laval Morgan
Hyrum Beck	Gene Owens
Jack Becker	W. Owens
W. D. Brown	Merlyn Russell
Elton Call	Frank Scheer
Ward Dickey	Pete Schultz
Wilford Frandsen	Russell Steele
Leonard Garner	Walter Thiel
Grant Grover	Cleo Teats
Cliff Grover	Preston Waldon
Jess Hall	Bernard Wershey
Oscar Holm	George Moore
Rulon Jenks	Moroni Whittacker
Arthur Lake	Art Levin
Dave Mahoney	Carl Metcalf
A. E. Moore	Warren Coon
Clifford Moore	Rulon Rigby, Jr.

Copy of Payroll for Idaho Falls Whse.

Week ending Feb. 12, 1942.

40 hr. week.

(Copy)

PAYROLL REPORT

L. S. TAUBE & CO., INC.

Francis Albertson	George Moore
Milton Aller	Ross Moore
Alvin Ball	Wayne Montague
Hyrum Beck	Laval Morgan
Jack Becker	Mertis Morgan
W. D. Brown	Gene Owens
Elton Call	W. Owens
Elias Clements	Merlyn Russell
M. Crandall	Frank Scheer
Ward Dickey	Pete Schultz
C. A. Falk	James Singleton
Wilford Frandsen	Russell Steele
Leonard Garner	George Shipley
Harald Goodell	Walter Thiel
Grant Grover	Cleo Teats
Cliff Grover	Clency Wadsworth
Jess Hall	Preston Waldon
Howard Hammer	Bernard Wershey
Jack Hendricksen	Moroni Whittaker
Oscar Holm	Willard Moore
Rulon Jenks	Art Levin
Arthur Lake	Carl Metcalf
Iver Haddon	Rulon Rigby, Jr.
Dave Mahoney	Warren Coon
A. E. Moore	Lincoln Albright (off
Clifford Moore	because of injuries)

Copy of Payroll at Idaho Falls Whse.

for week ending Feb. 5, 1942.

40 hr. week.

(Copy)

PAYROLL REPORT

L. S. TAUBE & CO., INC.

Anderson, Anton	Sayer, Burdette
Anderson, Frank	Seamond, Chester
Bridges, C. M.	Sellar, Chase
Christensen, Wesley	Sessions, Darwin
Christofferson, Mertin	Staples, Don
Cox, Adrain	Staples, Revoe
Cook, Alma	Young, Orson
Hansen, Donald	Wadsworth, Weldon
Hansen, Cecil	Polson, Gail
Harker, Frank	Eckersley, Joy
Jorgensen, John	Wright, Leland
Priest, Kenneth	

Payroll ending Feb. 13, 1942

L. S. Taube & Co.

Shelley, Idaho

BOARD'S EXHIBIT No. 6

S. FRIEDMAN & SONS
CAR LOT DISTRIBUTORS
POTATOES * ONIONS
IDAHO FALLS, IDAHO

Jens Lund
Marian Miller
Earl Carter
Marion Leatham
Harry Guilzens
Meyrrell Redding
Michey Smith
Harry Jeffers
Harold Atkinson
Dale Weber
Otto Korte
Fred Johnson
Chas. Hathway
Jack Rogers
Glen Waldon
Elden Johnson
Ellis Stroms
Ken Carlson

Gus Peters
Jerry Longbroke
Gilbert Jensen
Ewald Stamike
Dennis Hurley

Week of Feb. 16
O.H.H.

BOARD'S EXHIBIT No. 7

Copy

NAME OF POTATOE SORTERS OF FEB 16th,
1942 at IDAHO FALLS BONDED WARE-
HOUSE CO.

Feb. 16, 1942

Chester Clark
Sterling Smoot
Lew Campbell
Lee Hansen
Lowell Payne
Floyd Williams
Harry Williams
Stanley Payne
Delmar Rapp
Merlin Godfrey
Jess Bates
Leonard Burke
Hnery Simonson
Frank Worthington
Geo. Crosley
Harvey Hyrend
Dale Williams
John Griggs
Jack Heyrand
Clyde Williams
Hyrum Severson
Mert Morgan
Ray Ferguson

April 20, 1942

Delmar Rapp
Harry Williams
Stanley Payne
Geo. Shipley
Dorsal Morgan
Floyd Williams
Frank Worthington
Mert Morgan
Hyrum Severson
Lowell Payne
Jim Singleton
Hnery Simonson
Lew Campbell
Chester Clark
Merlin Godfrey
Ray Ferguson
Roy Rapp

BOARD'S EXHIBIT No. 8

Copy

J. E. O'NEIL

POTATOES

Idaho Falls, Idaho

4/27/42

February

Ray Weigel
Gerald Heyrend
Lawrence Clark
Swen Sorman
Ed Eslinger
Cleo Gardnier
Joe Becker
Mike Baesl
Glenn Davis
Randell Pilkington
Wm. Leviatt
Kirk Farmer
Joe Kraupp
Earl McDowell
Jack Fairless
Buck Batson
Woodrow Osterhart
Roy O'Neil
Floyd Taylor
Ellis Gillette
Elmer Elg
Thomas Rowley
Jack Sherrick
Les Shelton

April

Ray Weigel
Ed Eslinger
Wm. Leviatt
Swen Sorman
Joe Kraupp
Earl McDowell
Randall Pilkington
Kirk Farmer
V. M. Hicks
Woodrow Osterhart
Paul Walker
Lionel Brown
Ellis Gillette
Mike Baesl
John Knutsen
Merrill Leviatt
Vincent Jacobs
Floyd Taylor
Jack Fairless
Wm. Sauers
Jacob Sauers
Roy O'Neil
Harry Sauers
Francis Croft

February

Everett Kelsch

Gus Witt

John Knutsen

Wm. Sauers

Harry Edwards

Floyd Winder

John Calder

BOARD'S EXHIBIT No. 9

Copy

A. G. Stuart

Dealer

IDAHO POTATOES

Shelley, Idaho

Mr. Babcock

4-29-32

My pay roll of men from 16-21 of Feb. We only worked here 2½ hrs that week.

Andrew Millard

Jess Rowly

Clifford Mitchell

Francis Farrar

Clarance Linquist

Loyd Johnson

Floyd Mitchell

George Hardy

J. A. Whorton

A. G. Stuart

R. J. Rowly

BOARD'S EXHIBIT No. 10

Copy

Holden Bros., Inc.

Growers-Shippers

Potatoes

P. O. Box 859

Idaho Falls, Idaho

Speedkode

L. D. Phone 35

Mr. William Babcock

Rogers Hotel

Idaho Falls, Idaho

February 6th to 13th, 1942

Wayne Charlesworth

Pat Headdon

Hjalmar Anderson

Mart Hanson

Dan Edgington

Elbert Haddon

Vern Morgan

Russell Taylor

Dan Wilson

Udale Bailey

Ed Tschacher

Ed Holm

Shirley Montague

Bob Oakden

R. D. Hays

Arch Moffot

Albert Messmer

Seth Nield

G. A. Witt

Stanley Tovson

Bert Stoneberg

John Brus

Guy Bledsoe

D. Morgan

Allan Pittman

Kenneth Jones

Mike Zelozy

Virgil Brown

Elmer Hays

M. L. Bledsoe

Emil Winten

Glen Thomas

Ila Roland

Onis Coburn

Joe Kissner

Walter Bagshaw

C. S. Price

Mr. Babcock: Mr. Examiner, *did understand* Mr. Weston to say also that he is willing to stipulate with us,—I believe he is willing to stipulate with us also, and I offer this as a further stipulation, that on the dates of these payrolls lists that are in evidence as Board's Exhibits 3 to 10 inclusive [170] the Union had been designated by a majority of the employees on the lists in the units alleged to be appropriate?

Trial Examiner Barton: Does that correctly state the stipulation, Mr. Weston?

Mr. Weston: Yes, that correctly states the stipulation.

Trial Examiner Barton: All right.

Mr. Weston: Except that at this time the Respondents deny that the employees as of that time are the employees as of the present time. That the selection of the bargaining agent at that time did not compel or require the employer to bargain at this time with the agent selected as of February or the Spring of 1942.

Trial Examiner Barton: All right.

Mr. Babcock: I think there is one further stipulation in this connection that we did agree on and that is this: that we agreed with Mr. Weston that on those dates the Union did not represent a majority in the Shelley plant of the Respondent Potato Growers, or of the Respondent Taube, but did represent a majority in both plants taken together in each case.

Trial Examiner Barton: When you say "on

those dates” did you mean by that the dates alleged on the complaint or on the,—

Mr. Babcock (interposing): On the dates on the payrolls in evidence.

Trial Examiner Barton: On the dates shown on the payrolls? [171]

Mr. Babcock: Yes.

Trial Examiner Barton: All right. Then I take it you agree to the last stated stipulation, is that correct?

Mr. Weston: Yes, that is correct.

Mr. Penfield: Now there is one stipulation which was reached,—I will read it to you Mr. Reporter and if I go too fast you stop me. “Idaho Traffic Association was formed in September 1941 for the purposes of appearing in Board’s Exhibit 2, it is a territory,—its territory is divided into seven districts, four north of and three west of Pocatello, Idaho. Its principal office is in Idaho Falls, Idaho. The officers of the corporation are: J. R. Simplot (spelling), President; the office of Vice President is at the present vacant, in up until approximately August 1942 that office was held by J. E. O’Neil, now deceased; Chris Christensen, Secretary-Treasurer; the Directors are E. L. Peterson, Chris Christensen,—” I gave you that above, the same person, “—Andy Hansen; J. R. Simplot,—” and you have that, “—E. S. Harper, and Bill Bailey (Spelling). The manager is Carl DeLong. Each of the Respondents named in the complaint and N. S. Sage (Spelling) Henry Hurly (spelling), Nephi Fielding (spelling), R. S. Wil-

son, Holland and Ragon (spelling), and Chris Christensen, potato dealers or shippers in the Idaho Falls area is a member of the Idaho Traffic Association and has been since before January 1st, 1942. [172]

Since before January 1st, 1942 luncheon meetings have been held weekly at Idaho Falls, attended by representatives of the members of the Idaho Traffic Association, and by others. At these weekly meetings various matters in connection with the problems of the industry as a whole have been discussed. Carl DeLong generally presides at these meetings. At said meetings decisions are reached on various problems with reference to action to be taken by those members present.

At about the time the Union contracts were presented to the shippers or dealers Eli Weston, attorney of Boise, Idaho was requested by Farrel Hansen and Eugene Trask, manager and Director respectively of the Idaho Falls Potato Growers association to come to Idaho Falls to discuss the question of labor problems and labor contracts with potato shippers or dealers.

About February 16, Mr. Weston, in response to such request, attended one of the aforesaid weekly meetings. At this meeting the shippers or dealers present voted to retain Mr. Weston for the purpose of representing them in labor negotiations.

The dealers or shippers who had been presented with contracts by the Union voted to make contributions to a fund for the payment of Mr. Weston. Certain other dealers or shippers who had

not been presented with a contract by the Union voluntarily made contributions to said fund. [173]

These contributions were made at that time or at a later date and paid to Carl DeLong who deposited such contributions with the funds of the Idaho Traffic Association. At a later date Mr. Weston was paid his fee by a check of the Idaho Traffic Association signed by Carl DeLong; "is that correct Mr. Weston?

Mr. Weston: Yes, that is correct.

Trial Examiner Barton: Does that complete the stipulation now?

Mr. Penfield: Yes.

Trial Examiner Barton: Well let's go back off the record then and have the reporter read back. Off the record.

Mr. Penfield: With this one,—

Trial Examiner Barton: Do you want this in the stipulation?

Mr. Penfield: Yes. "It is further understood that this matter stipulated to is without prejudice to the right of any party to go into matters connected with the Association."

Trial Examiner Barton: For the record, is the stipulation as read back by the Reporter agreeable?

Mr. Weston: Yes.

Trial Examiner Barton: Agreeable to the Board?

Mr. Penfield: It is. [174]

Mr. Weston: Yes, it is agreeable to us. [175]

Mr. Babcock: I offer in evidence what has been marked for identification as Board's Exhibits 11

to 35, inclusive; these papers consisting principally of letters are offered as being either the originals, or exact copies of the letters they purport to be copies of. They are offered as having been sent on or about the dates they are dated, and received in due course of mail by the persons to whom addressed. [177]

Trial Examiner Barton: Is there any objection?

Mr. Babcock: With respect to certain letters which purport to have been signed by Lee Owen, the offer is made with the understanding that on the original letters the letter head of the charging union in this case appeared. I also offer them with the understanding that they were signed by the,—the originals of the ones we have copies of, were signed by the persons who were supposed to have signed them. These exhibits constitute, so far as our records show, the complete correspondence between the Union and its representatives, and the respondents and their representatives in this matter.

Mr. Weston: We have no objection to that stipulation, except the last statement, because we are not sure at this time whether that is the complete record, and we would like to reserve the privilege of introducing further correspondence, provided there is further correspondence.

Trial Examiner Barton: I take it that if further correspondence is discovered you would have no objection to its introduction in evidence?

Mr. Babcock: Oh, no. I don't say that it is the complete file.

Trial Examiner Barton: So far as you know it is,—that is what you meant to say?

Mr. Babcock: Yes, Mr. Examiner. [178]

Trial Examiner Barton: All right. The documents are admitted in evidence.

(Whereupon the documents heretofore marked Board's Exhibits 11 to 35, inclusive, for identification, were received in evidence.)

[179]

BOARD'S EXHIBIT No. 11

[Stamped]: Copy.

February 10, 1942

W. P. Wilson
Firth, Idaho

Dear Sir:

Enclosed you will find copy of an Agreement that has been drawn up and ratified by members of Truck Drivers and Warehousemen's Local #983 working in your plant. Only workers in your plant were allowed to participate in drawing up this contract. The majority of your employees are members of our Union and have given us bargaining rights to represent them in negotiations. A committee has been selected, composed of three members who are employed by your firm, Brother Ray Hansen and myself to act as the negotiating committee for the Union. It is our desire to start negotiations as soon as possible.

Hoping to hear from you as quickly as possible, I remain

Very truly yours,

LEE W. OWEN,

Secretary - Treasurer Truck
Drivers and Warehouse-
men's Local Union #983.

LWO AVW

BOARD'S EXHIBIT No. 12

[Stamped]: Copy.

February 13, 1942

Holden Brothers
Idaho Falls, Idaho

Gentlemen:

Enclosed you will find an Agreement that has been approved by the majority of the potato workers in all sheds in your district.

We would like a meeting with you as soon as possible to arrive at an agreement that will be satisfactory to you and to the members of our Union.

Trusting to hear from you in the very near future, I am

Very truly yours,

LEE W. OWEN,

Secretary-Treasurer.

LWO AVW

BOARD'S EXHIBIT No. 13

February 13, 1942

[Stamped]: Copy.

Idaho Falls Potato Growers Association

Idaho Falls, Idaho

Gentlemen:

Enclosed you will find an Agreement that has been approved by the majority of the potato workers in all sheds in your district.

We would like a meeting with you as soon as possible to arrive at an agreement that will be satisfactory to you and to the members of our Union.

Trusting to hear from you in the very near future, I am

Very truly yours,

LEE W. OWEN,

Secretary-Treasurer.

LWO AVW

BOARD'S EXHIBIT No. 14

[Stamped]: Copy.

February 13, 1942

Mr. J. E. O'Neil

Idaho Falls, Idaho

Dear Mr. O'Neil:

Enclosed you will find an Agreement that has been approved by the majority of the potato workers in all sheds in your district.

We would like a meeting with you as soon as possible to arrive at an agreement that will be satisfactory to you and to the members of our Union.

Trusting to hear from you in the very near future, I am

Very truly yours,
LEE W. OWEN,
Secretary-Treasurer.

LWO AVW

BOARD'S EXHIBIT No. 15

[Stamped]: Copy.

February 13, 1942.

Freedman and Son
Idaho Falls, Idaho

Gentlemen:

Enclosed you will find an Agreement that has been approved by the majority of the potato workers in all sheds in your district.

We would like a meeting with you as soon as possible to arrive at an agreement that will be satisfactory to you and to the members of our Union.

Trusting to hear from you in the very near future, I remain

Very truly yours,
LEE W. OWEN,
Secretary-Treasurer.

LWO AVW

BOARD'S EXHIBIT No. 16

(Copy)

February 13, 1942

L. S. Taube & Company
Idaho Falls, Idaho

Gentlemen:

Enclosed you will find an Agreement that has been approved by the majority of the potato workers in all sheds in your district.

We would like a meeting with you as soon as possible to arrive at an agreement that will be satisfactory to you and to the members of our Union.

Trusting to hear from you in the very near future, I remain

Very truly yours,

LEE W. OWEN,

Secretary-Treasurer

LWO AVW

BOARD'S EXHIBIT No. 17

(Copy)

February 16, 1942

Idaho Falls Bonded Warehouse
Idaho Falls, Idaho

Gentlemen:

Enclosed you will find an Agreement that has been approved by the majority of the potato workers in all sheds in your district.

We would like a meeting with you as soon as

possible to arrive at an agreement that will be satisfactory to you and to the members of our Union.

Trusting to hear from you in the very near future, I am

Very truly yours,

LEE W. OWEN

Secretary-Treasurer

LWO AVW

BOARD'S EXHIBIT No. 18

(Copy)

February 16, 1942

Mr. A. G. Stewart
Shelley, Idaho

Dear Mr. Stewart:

Enclosed you will find an Agreement that has been approved by the majority of the potato workers in all sheds in your district.

We would like a meeting with you as soon as possible to arrive at an agreement that will be satisfactory to you and to the members of our Union.

Trusting to hear from you in the very near future, I am

Very truly yours,

LEE W. OWEN

Secretary-Treasurer

LWO AVW

BOARD'S EXHIBIT No. 19

Idaho Falls, Idaho

February 24, 1942

Mr. Lee W. Owen, Secretary-Treasurer
Teamsters, Chauffeurs, Warehousemen,
and Helpers—Union 983
140 South First Street
Pocatello, Idaho

Dear Mr. Owen:

As you undoubtedly know, I have been asked by the Idaho Falls Employers Association to assist them and to represent them with reference to the proposed contracts which you have mailed to some of the members of this organization.

As I have been informed, most of the contracts that you have presented to date are to the potato packers and, of course, a contract to the Upper Snake River Valley Creamery. I do not have a complete list of all of the contracts you have mailed out, but I believe I am safe in saying that I am representing all of the recipients of these contracts in this area including Firth and Shelley. In fact the Shippers' Association are members of the Idaho Falls Employers Association and all contracts presented to members of that Association will be represented by the writer.

I had hoped to have a conference with either you or Mr. Hansen today. I had a few minutes yesterday but was unable to get in touch with Mr. Hansen, and now I find that I have to return to Boise tonight and will attend a meeting of the co-

operative creameries in Boise the latter part of this week, but I expect to be back here either Saturday of this week or Monday of next week. If you or Mr. Hansen are here in Idaho Falls, I wish you would notify me of that fact.

You might be interested to know that the State Master of the Idaho Grange and a large crowd of farmers and growers invited me as the representative of these packers to attend their meeting last night and to read the terms of these contracts to them.

I complied with this request and after discussion some rather definite resolutions were proposed and adopted. I do not have a copy of the resolutions, but I have been informed by some of the potato packers that the growers and farmers are insisting that they be represented in any negotiations with the union.

I wish you would give this also some thought and let me know what position you take in this respect as this action really places the packers in rather an embarrassing position.

If for any reason you wish to talk to me before I return to Idaho Falls, I will be in Boise from Wednesday morning until I return here.

Very truly yours,

ELI A. WESTON

EAW:m

BOARD'S EXHIBIT No. 20

(Copy)

March 4, 1942

Mr. W. P. Wilson
Firth, Idaho

Dear Mr. Wilson:

On February 10, 1942 we mailed you a contract covering workers in your warehouse who are members of Local 983.

Under the National Labor Relations Act the law states that you must negotiate with a Union that represents 51% or more of your workers. The law also states that this must be done within a reasonable length of time. We would like to hear from you at once what your position is in regard to negotiations.

Very truly yours,

LEE W. OWEN

Secretary-Treasurer

LWO AVW

BOARD'S EXHIBIT No. 22

(Cut)—Home of the Idaho Russet

W. P. Wilson

Idaho Potatoes

Box 114

Firth, Idaho

March 7, 1942

Teamsters, Chauffeurs, Warehousemen

& Helpers

Pocatello, Idaho

Attention Mr. Owen:

Your letter received today in regard to my attitude toward the labor contract received by me for the fore part of February.

As to negotiations, I thought it was understood that we, as potato dealers, went together as a group and employed Mr. Weston to do our negotiating, and I understand that he has been in touch with your representative, Mr. Hansen, at Idaho Falls.

Yours truly,

W. P. WILSON

WPW:wna

BOARD'S EXHIBIT No. 23

Eli A. Weston
Attorney at Law
Boise, Idaho

March 8, 1942

Mr. Lee W. Owens
Rogers Hotel
Idaho Falls, Idaho

Dear Mr. Owens:

With reference to the matter of further negotiations or meetings on the contract presented to the potato packers, I was of the opinion you wanted to leave the decision to the results of last Saturday's meeting.

We are in the same predicament we were before the meeting and perhaps worse. While I realize we must obey the law on the subject, I am afraid of what the results would be if we do not respect the farmers' demands.

The packers are having their regular meeting Monday and I will be present. A decision will be made as to our procedure. We were somewhat delayed as to the farmer matter but I will advise you with reference to our progress after the meeting.

I will also call you or see you at the end of this week if I am in Idaho Falls.

Very truly yours,
E. A. WESTON

EAW:MT

BOARD'S EXHIBIT No. 24

(Copy)

March 10, 1942

Idaho Falls Bonded Warehouse

Idaho Falls, Idaho

Gentlemen:

On February 16, 1942 we mailed you a contract covering workers in your warehouse who are members of Local No. 983.

Under the provisions of the National Labor Relations Act the law states that you must negotiate with a union representing 51%, or better, of your workers. The law also states that this must be done within a reasonable length of time. We would like to hear from you at once as to your position in regard to negotiating.

Your Yours very truly,

LEE W. OWEN

Secretary-Treasurer

LWO AVW

BOARD'S EXHIBIT No. 25

(Copy)

March 10, 1942

Mr. A. G. Stewart

Shelley, Idaho

Dear Sir:

On February 16, 1942 we mailed you a contract covering workers in your warehouse who are members of Local No. 983.

Under the provisions of the National Labor Relations Act the law states that you must negotiate with a union representing 51%, or better, of your workers. The law also states that this must be done within a reasonable length of time. We would like to hear from you at once as to your position in regard to negotiating.

Yours very truly,
LEE W. OWEN
Secretary-Treasurer

LWO AVW

BOARD'S EXHIBIT No. 26

(Copy)

March 10, 1942

Mr. J. E. O'Neil
Idaho Falls, Idaho

Dear Sir:

On February 13, 1942 we mailed you a contract covering workers in your warehouse who are members of Local No. 983.

Under the provisions of the National Labor Relations Act the law states that you must negotiate with a union representing 51%, or better, of your workers. The law also states that this must be done within a reasonable length of time. We would like to hear from you at once as to your position in regard to negotiating.

Yours very truly,
LEE W. OWEN
Secretary-Treasurer

LWO AVW

BOARD'S EXHIBIT No. 27

March 10, 1942

Idaho Falls Potato Growers Association
Idaho Falls, Idaho

Gentlemen:

On February 13, 1942 we mailed you a contract covering workers in your warehouse who are members of Local Union No. 983.

Under the provisions of the National Labor Relations Act the law states that you must negotiate with a union representing 51% or better of your workers. The law also states that this must be done within a reasonable length of time. We would like to hear from you at once as to your position in regard to negotiating.

Yours very truly,

LEE W. OWEN

Secretary-Treasurer

LWO AVW

BOARD'S EXHIBIT No. 28

March 10, 1942

Holden Brothers
Idaho Falls, Idaho

Gentlemen:

On February 13, 1942 we mailed you a contract covering workers in your warehouse who are members of Local Union No. 983.

Under the provisions of the National Labor Rela-

tions Act the law states that you must negotiate with a union that represents 51% or better of your workers. The law also states that this must be done within a reasonable length of time. We would like to hear from you at once as to your position in regard to negotiating.

Yours very truly,

LEE W. OWEN

Secretary-Treasurer

LWO AVW

BOARD'S EXHIBIT No. 29

(Copy)

March 10, 1942

L. S. Taube & Company

Idaho Falls, Idaho

Gentlemen:

On February 13, 1942 we mailed you a contract covering workers in your warehouse who are members of Local No. 983.

Under the National Labor Relations Act the law states that you must negotiate with a union that represents 51% or better of your workers. The law also states that this must be done within a reasonable length of time. We would like to hear from you at once as to your position in regard to negotiating.

Very truly yours,

LEE W. OWEN

Secretary-Treasurer

LWO AVW

BOARD'S EXHIBIT No. 30

Eli A. Weston
Attorney at Law
Boise, Idaho

March 16, 1942

Mr. Lee W. Owens
c/o Rogers Hotel
Idaho Falls, Idaho

Dear Mr. Owens:

I expected to be present at the Packers' meeting today but was unavoidably detained. However, I expect to hear from them tomorrow morning, with reference to further negotiations or conferences.

While things appear to be going slowly, I believe we will get these things ironed out without any serious difficulties.

I realize that you, as well as all the rest of us, appreciate the seriousness of our present national crisis and the nervousness and tension under which all people are conducting their affairs and that any attempt to use force or to try and crowd them at this time would really do more harm than good. It would only deter rather than expedite peaceful relationships.

We are taking the position at this time that all of these members of the Shippers Association are to be considered individually as to their contracts. I have been informed that in several instances the Union does not have 51 percent of the employees even though you have presented contracts claiming 51 percent or more.

In this connection, I would like to take these contracts up with you one by one. If you care to do so, I would like to have you send me either the number or the names of those employees of the Hurley Packing Warehouse who are in your Union. There are three or four others in this same category whose names I do not have. I will send them to you in a day or two. I believe we should eliminate this question first.

Just as soon as I receive the results of Monday's meeting, I will communicate with you; although I did believe that you had taken the position that you could handle the farmers at your last meeting and that you would either convince them your position was correct or relieve us of the of further negotiations at this time—that was my idea of the purpose of that meeting.

However, I will let you know just as soon as I hear from Idaho Falls. Please send me the information I have requested.

Very truly yours,

E. A. WESTON

EAW:MT

BOARD'S EXHIBIT NO. 31

Eli A. Weston
Attorney at Law
Boise, Idaho

March 23, 1942

Mr. Lee W. Owens
Rogerson Hotel
Idaho Falls, Idaho

Dear Mr. Owens:

I attended the Shippers meeting Saturday night at Twin Falls; and after the meeting, which broke up rather late, I tried to get a quorum meeting with the committee handling the question of labor relations. I couldn't get all of them together.

However, I discussed our last meeting with them and told them the problem with which we were faced and mentioned that you have insisted that further negotiations be entered into without delay.

Those present at the meeting were still very much concerned about the farmer problem and re-affirmed the position that they understood you had agreed to relieve the pressure of the farmers so that the way would be open for constructive negotiations. This, of course, you have been unable to do. I also mentioned the fact that you have refused to take the employers' problems up in the order we have asked, but that you are insisting that they be taken up in the order you have presented the contracts.

On this point, I believe our position is the better one inasmuch as we should eliminate all questionable cases involving the 51 percent rule before we

proceed with the others. I mention this because if we can agree on the forms of contract, we will have eliminated all legal questions and will know to whom the type of contract will apply.

We also discussed somewhat the question of an industry-wide contract. I informed them that you had taken the position you could insist upon bargaining for the entire industry if you had 51 percent of all employees of all the employers in the industry. This position I very seriously question. Since talking with you I have re-examined some of the cases in point and therefore re-affirm my position that this is not consistent with the holdings in these cases. However, I might suggest that this point be submitted by a stipulation of facts to the National Labor Relations Board for an advisory opinion. In view of the fact that this is of such importance we could submit it immediately and receive an immediate answer. After receiving this opinion, we could act accordingly. Please let me know what you think of this idea.

I had a phone call last night from Mr. Goodwin from the Conciliation Service of the Department of Labor who is in Twin Falls. He has asked for a meeting with me for tomorrow morning. If I can find my clients, I will have to be at that meeting in the morning. If we can finish during the day, I expect to return to Boise in the evening and then will leave for Idaho Falls Thursday.

I will call a full meeting of this labor committee Thursday night and will notify you either Thursday night or Friday morning as to further negotiations

or discussions. Trusting this is satisfactory and that I will see you Thursday or Friday, I am

Very truly yours,

E. A. WESTON

EAW:MT

c.c. Carl Delong

C. R. Holden

Chris Christenson

F. L. Hansen

BOARD'S EXHIBIT NO. 32

Eli A. Weston

Attorney at Law

Boise, Idaho

March 31, 1942

Mr. Lee W. Owen

140 South First Street

Pocatello, Idaho

Dear Mr. Owen:

I am sorry I was unable to get the committee together for a meeting. Mr. Delong was in Boise and it was impossible to get two of the creamery men in for the meeting. As soon as I found this out, I informed Mr. Hansen of the fact so that you would be saved the inconvenience and expense of a trip.

I will be in Idaho Falls again tomorrow to attend a meeting on another matter. I will again take the question up with these committees and notify you just as soon as we can arrange a meeting.

In the mean time, I will go over the creamery contract and submit such paragraphs in the contract as are acceptable to us in the form of a counter-proposal. This information I will send to Mr. Hansen.

Very truly yours,
ELI WESTON

EAW:MT

c.c. Mr. Raymond Hansen

BOARD'S EXHIBIT No. 33

April 3, 1942

Mr. F. L. Hansen

Idaho Falls Potato Growers, Inc.

Idaho Falls, Idaho

Dear Mr. Hansen:

Mr. Weston has asked me to write you that he is ill in bed and will be unable to attend your meeting Monday. He also asked if you would please notify Mr. McCracken.

Very truly yours,
Secretary

c.c. Mr. Raymond Hansen

Mr. L. W. Owen

BOARD'S EXHIBIT No. 34

(Copy)

April 3, 1942

Mr. Eli A. Weston, Attorney
Boise, Idaho

Dear Sir:

On or about March first you informed me that you represented most of the potato shippers and members of the Cooperative creamery in regard to labor negotiations.

We have had several meetings where nothing has been accomplished as far as negotiations are concerned. Your last letter, dated March 31, states that it was impossible for you to get the joint committees of the Idaho Falls Potato Growers Association and the Co-op Creamery together.

I feel this is not setting a policy to negotiate in good faith. Therefore, I can see no reason for further meetings until you have been able to show that you will negotiate in good faith. Therefore, we are filing charges against the Co-op Creamery and several potato shippers and yourself as their representative for failure to negotiate in good faith under the National Labor Relations Act.

If you wish to reach me at any time, you may do so at my office at 140 South First Avenue, Pocatello, Idaho.

Very truly yours,

LEE W. OWEN,

Secretary-Treasurer

LWO AVW

BOARD'S EXHIBIT No. 35

Eli A. Weston
Attorney at Law
Boise, Idaho

October 24, 1942

Mr. Lee W. Owen,
Teamsters, Chauffeurs, Warehousemen and
Helpers Union No. 983
140 South First Street
Pocatello, Idaho

Dear Mr. Owen:

I am preparing the answers to be filed in the case in which you are Representative of the Union have charged the employers with: Interference with the Union, Discriminatory discharge of employees and Refusal to bargain.

With reference to the third charge, refusal to bargain, we are confronted with the very serious question of the right of the Union to ask us to bargain or the propriety of our bargaining without knowing the status of the Union as the bargaining agent.

Aside from the sending of the contracts (some of which have been withdrawn) and the demand on the part of the Union to bargain, we have never had any proof either by certification or otherwise that the Union represents 51 percent or more of any establishment's employees. We have never waived this and we take the position that this certification should be forthcoming as of this date or

as the date of the filing of the Complaint and not as of February, 1942.

We further contend that we have never been notified that you have 51 percent and that there is no obligation on our part to bargain. We now insist or make demand upon the Union to prove to us by certification or otherwise that they have the right to bargain for the employees in any of the respondents' places of business and that you have at this time 51 percent of this season's crew in the Union. Until this is established to our satisfaction or to the satisfaction of the Board we believe we would be violating the law and laying ourselves open to criticism or legal action for bargaining with one who is not the authorized agent.

Incidentally, I believe that we were making such good progress before this Complaint was issued that we could have had this matter straightened up in two weeks' time. Hansen and Holden were in Washington, Carl DeLong was sick in bed and two or three members of the Board were out of the City; otherwise I think our meeting Monday would have brought splendid results. I think it is unfortunate that this case was brought at this time. In view of our experience last time in the Creamery case I do not feel inclined to negotiate a contract with a hearing or Labor Board case in abeyance, especially where the work of preparing our defenses will take all of my time between now and November 2.

Please furnish us the information requested so that I can prepare our case accordingly.

With personal regards, I am

Very truly yours,

E. A. WESTON

EAW:MT

c.c. Mr. Ray Hansen

Mr. Louis Penfield

Mr. Weston: The respondents at this time ask leave to amend paragraph six of their answer by including at the end of the paragraph these words, "and that the unit mentioned for the respondents L. L. Taube and the Idaho Falls Potato Growers, Incorporated, does not constitute a proper unit for the purposes of collective bargaining." [180]

Trial Examiner Barton: Is that the respondent L. L. Taube. I thought you said, "L. L. Taube." The reason I asked you is,—

Mr. Weston: Thank you. It is L. S. Taube & Company. Will you make that correction, Mr. Reporter? It should be "L. S. Taube & Company."

Trial Examiner Barton: And the other respondent was?

Mr. Weston: The Idaho Falls Potato Growers, Incorporated, is their correct name.

Mr. Babcock: It is the Idaho Potato Growers, Incorporated. It appears from the pleadings it is "Idaho Falls Potato Growers Association." I intend to move to amend the pleadings to conform the name to the testimony.

Trial Examiner Barton: The motion is granted.

Mr. Babcock: I move at this time to amend all of the pleadings and change the name of the Idaho Falls Potato Growers Association, wherever it appears, to Idaho Potato Growers, Inc.

Trial Examiner Barton: Is there any objection?

Mr. Weston: No objection.

Trial Examiner Barton: The amendment will be allowed. [181]

L. W. OWEN,

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Barton: State your full name for the record, please.

A. L. W. Owen.

Q. (By Mr. Babcock): Mr. Owen, before we start I want to hand you Board's Exhibits 11 to 35, inclusive, so that you may refer to them in the course of your testimony.

(Mr. Babcock hands papers to witness.)

Q. Where do you reside, Mr. Owen?

A. Pocatello, Idaho.

Q. What is your occupation?

A. Secretary-Treasurer of Teamsters Union, Local 983.

Q. That is the union which filed the charge in this proceeding?

A. Yes, sir.

(Testimony of L. W. Owen.)

Q. And the correct name of the union is stated in the Complaint in this proceeding?

A. Yes, sir.

Q. How long have you held that position with that organization.

A. With this particular organization, since the 27th of December, 1941. [182]

Q. Had you been connected with the Teamsters *Internation Union* prior to that time?

A. Yes, sir.

Q. For how long? A. Since 1936.

Q. In what capacities?

A. Officer of different Teamsters Union.

Q. How did you happen to become connected with the Union at Pocatello in December of 1941?

A. I was sent in here to take over two local unions that was in here, which were consolidated into one.

Q. Where were the offices of those two local unions?

A. One was at Pocatello; the other at Idaho Falls.

Q. What were their respective numbers?

A. The one at Idaho Falls was Local 852, and the one at Pocatello was 440.

Q. After you came, how long did the charters of those two unions continue to be in effect?

A. In reality they were in effect until January 16th.

Q. And what happened at that time?

A. At that time there was a new charter that was granted from our International, consolidating both unions.

(Testimony of L. W. Owen.)

Q. Had the charters of the other two unions been revoked? A. Yes, sir.

Q. By whom? [183]

A. Revoked by our International.

Q. Were you in charge of the affairs of the two former unions from the date you first came to Pocatello in December to January 16th?

A. That is right.

Q. Since that time have you been secretary-treasurer of Local 983 continuously? A. I have.

Q. Since January 16th? A. That is right.

Q. And is that the date of the charter of Local 983? A. That is correct.

Q. What is the geographical jurisdiction of Local 983?

A. Comprises Pocatello, Idaho Falls and vicinity,—the state of Idaho and vicinity.

Q. Where is its office,—its main office?

A. The main office is at Pocatello, Idaho.

Q. Does it have any other office?

A. It has an office here in Idaho Falls.

Q. Does the union hold meetings of its membership? A. That is right.

Q. Does it attempt to engage in collective bargaining for its members and other employees?

A. Yes, sir.

Q. Has it collective bargaining agreements with employers? [184] A. Yes, sir.

Q. Does it, in other ways, function as a labor organization? A. That is right.

(Testimony of L. W. Owen.)

Q. As secretary-treasurer what are your duties?

A. Keeping the affairs of,—all financial affairs of the local; also organizing and collecting dues, and attending to all labor negotiations,—practically all affairs of the local.

Q. Are you the only full time officer of this particular local? A. No, I have one man.

Q. What is his name?

A. Ray Peterson, stated in Idaho Falls here, and also two secretaries.

Trial Examiner Barton: Are they both full time?

A. Yes, sir.

Q. (By Mr. Babcock): Those are stenographers, you mean? A. Yes, sir.

Trial Examiner Barton: What is Peterson's title?

A. He is business agent.

Q. How long has Ray Peterson been connected with the local in Idaho Falls?

A. Approximately three months.

Trial Examiner Barton: Is it "Ray Peterson, "A. Peterson?" [185] A. Ray.

Q. What type of workers are eligible for membership in the local union?

A. Anyone that is connected with warehouse work; creameries; the trucking industry; coal and lumber yards. I guess that covers about all of it.

Q. Are farm laborers eligible for membership?

A. They are not.

Q. Do you attempt to represent workers who are working in the fields with respect to that work?

(Testimony of L. W. Owen.)

A. We do not.

Q. Have you undertaken to represent and organize workers in potato warehouses and on the cellar crews working out of the potato warehouses?

A. That is right.

Q. In what vicinities?

A. Idaho Falls, Shelley and Firth; also Rexburg.

Q. When was that effort first taken, Mr. Owen?

A. Around the first week of January.

Q. Of what year? A. 1942.

Q. Perhaps before I go into that I should develop the affiliation of your local union. With what Internationals is it affiliated?

A. With the International Brotherhood of Teamsters, Chauff- [186] feurs, Warehousemen and Helpers, American Federation of Labor.

Q. Is it affiliated with any councils of your International Unions?

A. You mean our particular local?

Q. Yes; your particular local.

A. Yes; we are affiliated with the Western Warehouse Council; the Western Dairy Council; the Western Produce Council; Joint Council of Teamsters, Local 67; and the Western Conference, which comprises eleven western states.

Q. Is Ray Hansen connected with the local union, or affiliated with the local union?

A. At the present time he is connected with Joint Council 67. Prior to about two or three weeks ago he was connected with the Warehouse Council.

Q. Prior to about what?

(Testimony of L. W. Owen.)

A. About two weeks ago.

Q. What was his position with the Warehouse Council? A. Organizer.

Q. Referring again to the initial attempt to organize the potato workers which you say was started in January, who was in charge of that work? What persons?

A. Mr. Ray Hansen and myself.

Q. Did you come to Idaho Falls at that time around the first of January? A. Yes. [187]

Q. Both you and Mr. Hansen?

A. That is correct.

Q. And how long did you remain here?

A. Off and on, I remained here until the present time.

Q. How long did Mr. Hansen remain here?

A. He stayed here until around some time in,— I think it was the latter part of March, if I am not mistaken.

Q. Did you and Mr. Hansen work together on this work? A. Yes, sir.

Q. Which one of you took the more active part with respect to the organization of the workers?

A. Mr. Hansen.

Q. Were you here at the very beginning of his initial attempts to organize the workers?

A. Yes, sir.

Q. As a result of those attempts did you receive applications for membership, and designations as bargaining agent, from workers in the warehouse and cellar crews? A. Yes, sir.

(Testimony of L. W. Owen.)

Q. In the Idaho Falls area? A. Yes, sir.

Q. When did you have your first meeting in Idaho Falls for these workers?

A. If I am not mistaken it was called for the fourteenth of January, when the notices were sent out,—it was either the [188] fourteenth or the sixteenth we had our first meeting for the potato workers.

Q. Were you here at that time?

A. Yes, sir.

Q. Approximately how many workers attended the meeting?

A. I would say there was in the neighborhood of one hundred and fifty.

Trial Examiner Barton: What date was that?

A. It was either the fourteenth or sixteenth of January. I am positive it was the fourteenth.

Mr. Babcock: I will ask that this paper be marked as Board's Exhibit No. 36 for identification.

(Thereupon, the document hereinabove referred to was marked as Board's Exhibit No. 36, for identification.)

Q. I refer you to what has been marked for identification as Board's Exhibit No. 36, which purports to be a notice. Will you state what that is, and whether you have seen it before?

A. This is a notice that was sent out calling attention of all potato workers to,—

Q. Don't read it, Mr. Owen. It was a notice of a meeting? A. It was a notice of a meeting.

Q. Was that notice for the first meeting?

(Testimony of L. W. Owen.)

A. I think it was a notice that was,— [189]

Q. If you are not able to state for sure, just say so, Mr. Owen.

A. This, I am positive, was our first meeting for that matter.

Q. And the date of the meeting was January 16th? A. That is right.

Mr. Babcock: I offer this notice in evidence.

Mr. Weston: No objection.

Trial Examiner Barton: It may be admitted.

(Whereupon, the document heretofore referred to and marked Board's Exhibit No. 36 for identification, was received in evidence.)

Q. After this, did you continue to have meetings of workers here? A. That is right.

Q. Were they organizational meetings?

A. Yes.

Q. By February 10th, approximately how many workers had either applied for membership, or designated the Union as their bargaining agent?

A. At that time I imagine we had around three hundred, or a little better, that was signed up.

Mr. Weston: May I ask if that includes your warehouse employees in the potato sheds.

Mr. Babcock: I meant to confine the question to the [190] workers of these crews, in the warehouse and cellar crews.

Trial Examiner Barton: Is that the way you understand the question? A. No.

Trial Examiner Barton: You may amend your answer accordingly, then.

(Testimony of L. W. Owen.)

A. I don't know the exact number, or how many we had signed up, but we had the majority in quite a few of the potato sheds in this locality.

Q. (By Mr. Babcock): And your total membership was approximately three hundred?

A. That is right.

Q. Referring there to those exhibits, Boards Exhibits 11, 12, 13, 14, 15, 16, 17 and 18, which are letters which you sent to certain,—to the respondents in this proceeding, I will ask you to state whether the identical letters were sent to other shippers, other potato shippers employing warehouse crews?

A. You mean the original of these?

Q. Yes. A. Yes.

Q. I am asking whether originals,—identical letters in the same form were sent to shippers other than those named in these letters and involved in this case,—perhaps I can shorten this by asking you whether at the same time, or [191] approximately the same time those letters were sent, identical letters were sent to the following potato shippers employing warehouse crews: Nephi Fielding?

A. That is right.

Q. N. S. Sage? A. Yes, sir.

Q. R. S. Wilson? A. Yes, sir.

Q. Atlantic Commission Company?

A. Yes, sir.

Q. Henry Hurley? A. Yes, sir.

Q. Holland and Regan,—or Regan & Holland, Shelley? A. Yes, sir.

(Testimony of L. W. Owen.)

Q. Do you recall of any others letters were sent to at that time that I haven't mentioned?

A. No; I don't.

Trial Examiner Barton: Is it your recollection any others were sent, even though you can't remember the names of the shippers?

A. Besides these? I think not.

Trial Examiner Barton: All right.

Mr. Babcock: Just a moment. I want to check that to see that we have got them all.

Q. (By Mr. Babcock): Did I mention Chris Christensen? [192] If I didn't, did you send a letter to him? A. Yes, sir.

Q. Now, what reply, or response, if any, did you receive from these letters you sent out?

A. None at that time.

Q. I refer to Board's Exhibit No. 19, and ask you to state whether that is the first reply, either written or oral, you received to the letters you had sent? A. This is the first written reply we received. [193]

Q. Following the receipt of this letter from Mr. Weston, which is Board's Exhibit No. 19, did you have any meetings with any of the employers, or any of the representatives of employers?

A. I did not,—following the meeting, did you say?

Q. No; after you received this letter from Mr. Weston which I referred to as Board's Exhibit No. 19 in which he states in the last paragraph, that he

(Testimony of L. W. Owen.)

plans to return to Idaho Falls, did you talk to Mr. Weston subsequent to this letter dated February 24th,—after the letter, after you got this letter?

A. Oh, yes. [194]

Q. When was the first time you talked personally to Mr. Weston about these particular cases, or these particular contracts?

A. It was some time after receiving the letter.
[195]

Q. I refer to this exhibit, Board's Exhibit No. 37, and to the second paragraph thereof, does that refresh your recollection as to the date of your first talk with Mr. Weston on these cases? A. Yes.

Q. And what was the date you first talked to him?

A. The first meeting was had with Mr. Weston was on the second of March.

Q. Now, prior to that time had,—other than the letter from Mr. Weston, Board's Exhibit No. 19, had you received any communications from any of the shippers or their representatives with respect to negotiations? A. No.

Q. What was taking place during this intervening period with respect to negotiation of contracts for these employees?

A. There was nothing in regard to negotiations taking effect. The only thing we were doing was organizing more of the workers in this locality.

[196]

Q. How was the meeting on March 2nd arranged,—at whose instance?

(Testimony of L. W. Owen.)

A. Mr. Weston called Ray Hansen, if I am not mistaken, for the meeting, although I think Ray Hansen asked to have that meeting on March second.

Q. You don't know about that then? You don't know actually how it happened?

A. I don't know how it happened, as I was not up there at the time.

Q. There was a previous appointment made before the meeting? A. That is right.

Q. Where was the meeting held?

A. At the Rogers Hotel.

Q. What persons were present at the meeting or the conference?

A. There was Ray Hansen, Walter Graham,—

Q. Where did he work?

A. At the Co-op creamery.

Q. That is the Upper Snake River Valley Dairymen's Association? A. Yes, sir. [197]

Q. Of which E. S. Track is the manager?

A. That is right. And Mr. Weston and myself. I also think Milo Rash,—

Q. Who is Milo Rash?

A. He was a worker at the Potato Growers Association; also a member of our union.

Trial Examiner Barton: Was Graham of your union? A. Now?

Trial Examiner Barton: No; was he at the time of this meeting? A. Yes.

Trial Examiner Barton: I just wanted to identify him.

(Testimony of L. W. Owen.)

Q. (By Mr. Babcock): Mr. Owen, during this same time, or approximately the same time that you undertook your negotiations with the potato growers, were you also attempting to negotiate with the Co-op Creamery? A. Yes, sir.

Q. Did Mr. Weston also represent the Co-op Creamery? A. He did.

Q. And Mr. Graham, was he the delegate from the crew there? A. He was.

Q. Is that also true of Rash, that he was a delegate from the crew? [198] A. He was.

Trial Examiner Barton: Where was Rash from?

A. From the Potato Growers Association.

Q. (By Mr. Babcock): Had Mr. Rash taken any particular part in the union up to this time? If so, what part had he taken?

A. Yes; he helped us organize the different workers, especially in the Potato Co-op, and attended all of our meetings, and assisted Ray Hansen in organizing the workers.

Q. During what period of time did he do that? When did it start?

A. It started around the middle of January.

Q. Going back to the meeting again, have you named all of the persons that were present at the meeting? A. To my knowledge; yes, sir.

Q. You say the appointment was at two o'clock. What time did Mr. Weston arrive?

A. Around four.

Q. Did you wait for him? A. Yes, sir.

(Testimony of L. W. Owen.)

Q. How long did you talk with him after he arrived?

A. As I recall, we talked for about two hours that day. [199]

Q. Was Mr. Weston the only representative of any of the employers who was present at the meeting?

A. At that meeting, yes.

Q. I refer you to Board's Exhibit No. 38 for identification which purports to be a copy of a wage scale and agreement, and I will ask you to check through that and state whether you know what it is.

A. Yes, sir; it is the agreement we presented to the shippers.

Q. This is a copy of the agreements?

A. That is right.

Q. Were identical agreements sent to all the employers involved in this case?

A. Yes, sir.

Q. Were those sent,—were those enclosed with the letters, Board's Exhibits twelve to eighteen, inclusive?

A. They were.

Q. Were they also sent to other shippers to whom you sent [200] letters?

A. They were.

Mr. Babcock: We offer in evidence Board's Exhibit No. 38 for identification.

Mr. Weston: We have no objection.

Trial Examiner Barton: It may be admitted.

(Thereupon, the document heretofore marked Board's Exhibit 38 for identification, was received in evidence.)

(Testimony of L. W. Owen.)

BOARD'S EXHIBIT No. 38

(Copy)

WAGE SCALE AND AGREEMENT

Agreed to and to be in effect between.....
and all territory and Local Unions of the I. B. of
T., C., W. & H. of A., as represented by Joint
Council of Teamsters, #67, of Utah and Southern
Idaho, hereinafter designated as the Union.

Article I.

Section A. Members in good standing of the Union only will be employed, except should the Union not be able to furnish satisfactory men, or if the Union men are not available, non-Union man or men, woman or women, as the case may be, may be employed, but must make application to become a member of the Union the first week he, or she, or they are employed, and if found satisfactory to the Employer and worthy to the Union after two (2) weeks' employment, he, she or they will be admitted to full membership in the Union and must complete their affiliation within thirty (30) days.

Section B. The Employer hereby reserves the right to discharge any man or men, woman or women in his or its employ furnished by the Union to them, if the work is not satisfactory to the Employer. Any man or woman under dispute may appeal to the Manager or the Union, or both.

Section C. No workman shall be discharged or discriminated against for upholding Union prin-

(Testimony of L. W. Owen.)

ciples and any man or woman who works under the instruction of the Union shall not lose his or her position or be discriminated against for this reason; and it shall not be a violation of this Agreement for an employee to refuse to go through a picket line established by an A. F. of L. organization. This Union is not in favor of sympathetic strikes and will do everything honorable to prevent them.

Section D. No employee member of the party of the second part, who, prior to the date of this Agreement was receiving more than the rate of wages designated in this schedule, or working under more favorable working conditions, than contained herein for the class of work in which he or she was engaged, shall suffer a reduction of wages or work under less favorable conditions through the operation or because of the signing of this Agreement.

Section E. All work performed on Sundays, New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day, or days observed as such, shall be paid for at the rate of time and one-half of the regular hourly rate provided, however, that employee assigned regularly to Sunday or holiday work for the continuous operation of the company's business will be compensated at the regular rates.

In the event employee is assigned other days than Sundays or holidays as his or her day off, and is then required to work on said assigned day off, he or she shall be compensated for all work performed

(Testimony of L. W. Owen.)

on said day at the rate of his or her regular rate of pay, in addition to his or her regular rate of pay plus one-half ($1\frac{1}{2}$) his or her regular rate of pay, in addition to his or her regular hourly or monthly wage.

Section F. Employees covered by this Agreement, when drafted for military service, shall be reinstated upon their release from such service in accordance with the provisions of the Selective Training and Service Act.

Section G. In the event that.....engages in a line-haul operation between the jurisdiction of Union, they shall compensate drivers in accordance with the long-line freight agreement in effect in the area in which they operate.

Section H. Both parties hereto further recognize and agree that industrial peace is to be desired at all times in the area covered by this Agreement, and to that end it is agreed:

1. For the purpose of adjusting differences or controversies relative to the application or interpretation of any of the provisions of this Agreement, a Board of Arbitration is hereby created, to consist of two representatives of each party hereto. In the event that an agreement cannot be reached, members of said board shall select a fifth (5th) member who shall be a disinterested party. The findings and decisions of said Board of Arbitration shall be final upon both parties of this Agreement.

2. Any complaint or other matter for consideration of the Board of Arbitration shall

(Testimony of L. W. Owen.)

first be investigated by the party hereto representing the person making the complaint, then filed in writing, with all supporting evidence, with the Board of Arbitration, and such Board of Arbitration shall be required to render a decision in not to exceed seven (7) days, not including Saturdays, Sundays and legal holidays.

3. That complaints relative to the proper rate of pay or amount of pay due any employee under existing wage scales need not be submitted to the Board of Arbitration. Such complaints shall first be investigated by the Union having jurisdiction over the person making the complaint and then filed in writing, with all supporting evidence, with the Employer for investigation and adjustment, and if within five (5) days, not including Saturdays, Sundays or legal holidays, after the receipt of such complaint, the Employer has not been able to adjust the complaint to the satisfaction of the Union, the Union shall have the right to take action against the Employer against whom the complaint has been filed.

3a. All complaints regarding wages or overtime must be turned into the secretary of the Union in writing and signed within not to exceed two (2) pay days; otherwise the Company will not be required to make a settlement. Said member violating this clause will be subject to a fine or suspension by the Union.

(Testimony of L. W. Owen.)

4. In the event that any matter is submitted to the Board of Arbitration which pertains to proper compensation to any employee, member of the Union covered hereunder, and the Board of Arbitration finds that a violation of the Agreement has existed, then and in that event the Board of Arbitration shall be required hereunder to make the decision retroactive to the date on which the first violation occurred.

5. The Board of Arbitration as hereinunder set forth, shall not handle negotiations for a new agreement or changes in the wage scales, hours of work, or working conditions, which are a part of this Agreement.

Section I. The Employer agrees that extra men will not be employed where the employment of such extra men will have the effect of reducing the hours of the regular men employed below forty-eight (48) hours in any one week, and in the event that the Employer, or any authorized agent of the Employer, does make a practice of employing extra men in violation of this understanding, the Union shall have the right to refuse to furnish any extra men to such Employer or his authorized agent.

Section J. In the event employee covered by this Agreement, based in one classification work in another classification, he or she shall be compensated for the entire day so worked on the wage scale in effect in the highest classification in which they perform.

(Testimony of L. W. Owen.)

Section K. Section I of this Agreement shall apply, in its entirety, to all Local Unions affiliated with Joint Council #67. Wage scales and working conditions for the various Local Unions covered by this Agreement shall be attached to and become a portion of Article II of this Agreement.

Section L. All benefits and privileges now in effect concerning the employees shall continue and extend to all new employees.

Section M. Present employees of the Employer whose earning capacity is limited because of age or physical handicaps, may be employed, where practicable, on light work at a wage suitable to the Employer and the Union.

Article II.

Section A. Regular employers shall mean men and women employed in potato warehouses who have assignments of work in the normal course of the operation of the various systems employed and who are not subject to daily dispatch through the office of the Union.

Section B. Extra men as hereinafter defined shall be paid at the regular rate of the classification in which they are worked, plus ten (10c) cents per hour, except in the event that they are guaranteed nine (9) hours work or more in any one day, they or he, as the case may be, may be paid at the basic rate for the classification, herein provided, under which he is worked.

Extra men shall mean men hired by the day in

(Testimony of L. W. Owen.)

emergency periods of work that are in excess of the regular employees' complement, and shall be required to clear through the office of the respective Union covering the jurisdiction in which he is working.

Section C. No extra man or woman will be allowed to work overtime except when the regular crew also works overtime.

Section D. Effective on the signing of this contract in Idaho Falls:

Nine (9) consecutive hours within an eleven (11) hour period shall constitute a day's work, and fifty-four (54) hours shall constitute a week's work, Monday through Saturday inclusive. All time worked over nine hours in any one day or over fifty-four (54) hours in any one week shall be considered overtime, except drivers may be worked twelve hours within a thirteen-hour period before overtime starts. There shall be no time deduction for meals on continuous operation.

All employees covered by this Agreement, in all territories, shall be compensated for all overtime worked at their regular rate of pay plus one-half ($\frac{1}{2}$) their regular rate of pay.

Section E. Employees called to work shall receive not less than four hours' pay or four hours' work, time to start when ordered to report for work. It is not intended that this provision shall apply when employees are required to work additional time in excess of the regular nine (9) hour

(Testimony of L. W. Owen.)

day; such additional time in such case may be less than four (4) hours. All men and women shall be notified the night before.

Section F. The pay shall start for all country crews and shall continue from the time they depart from a designated point and until they return to a designated point at quitting time.

There shall be a minimum of nine (9) men on all country crews providing the truck driver does not take the place of a crew man; in that event there shall be ten men to a crew.

The Company shall furnish transportation to and from country.

Section G. When it becomes necessary to reduce the working force at said....., seniority shall prevail with respect to all regular employees, qualifications being sufficient, namely: the practice will be for the management to lay off first those employed shortest in time of service.

In rehiring, seniority shall prevail, and the practice will be that the regular employee with the longest service record with said..... will first be rehired.

Further, no new men will be hired until all former available competent and regular employees employed at the time of the signing of this Agreement have been afforded an opportunity to return to work.

(Testimony of L. W. Owen.)

Wage Scale

The wage scale shall be as follows:

To all men not otherwise classified.....	65c per hour
Truck drivers shall receive.....	75c per hour
Sackmen shall receive.....	70c per hour
Working foremen shall receive.....	\$35.00 per week
Grader men and crew foremen shall receive	75c per hour
Shipping and receiving clerks shall receive	75c per hour
Mechanics shall receive	80c per hour

The basis of determination shall be the United States Department of Labor index of all goods purchased by wage earners and lower salary workers (all items) for the mountain area. Should the cost of living index increase or decrease beyond the index for months, 1942 by two points or majority fraction thereof, wages will be increased or decreased one cent per hour for each two points or majority fraction thereof of increase or decrease. Increases or decreases to the above basic wages when made will become effective on January 1, April 1, July 1, and October 1 of each calendar year and the amount of the increase will be applied to the basic wage for the quarter beginning on those dates and will be determined as above provided by the difference between the month, 1942 index oramount and the index of each February 15, each May 15, each August 15 and each November 15 during the life of the Agreement.

(Testimony of L. W. Owen.)

Plant Employees—Female

1. Should any female employees be used in any classifications listed elsewhere in this Agreement, they shall receive the same rate of pay as specified for male employees.

2. No female employee shall be employed for more than eight (8) hours per day within nine hours nor more than forty-eight hours per week.

All female employees shall be allowed at least two ten minute rest periods, one in the forenoon and one in the afternoon.

Article III.

This Agreement is to continue and remain in full force and effect and to be binding upon the respective parties hereto from....., except that either party may open Article II of the Agreement covering wages and working conditions on 1942 or any..... the 1st thereafter by serving notice in writing upon the other party of its desire to open Article II for the purpose of discussion and/or amendment, said notice to be served at least thirty (30) days prior to the first day ofin any year. Upon the opening of this contract as of any.....the 1st, the amendments agreed upon shall be effective as of the 1st upon which the agreement is opened,

(Testimony of L. W. Owen.)

irrespective as to the length of time which may be consumed in negotiations or amendments.

TRUCK DRIVERS & WARE-
HOUSEMEN LOCAL UNION
No. 983

By

By

Employer

.....

By

—

Q. At this meeting on March 2nd, was that confined solely to discussion of the question of the negotiation of an agreement for the potato shippers, or was there also some discussion of the Co-op Creamery situation? A. Both.

Q. Will you relate the discussion that took place at that meeting, stating,—naming the persons who made the statements you testify to, and giving it to us in approximately the order in which it took place, the March second meeting?

A. As I recall, Mr. Weston stated that he had just attended a meeting, and that with the attitude the Grange and the farmers were taking he didn't see how it was going to be possible that we could reach an agreement until that was straightened up, or negotiate an agreement.

Q. Before you go on, did he say what meeting he had just [201] attended?

(Testimony of L. W. Owen.)

A. As I recall he attended a meeting of the shippers, of the traffic association.

Q. Was this on a Monday?

A. I think it was.

Q. Go ahead now and tell the rest of the discussion there on March second in the hotel?

A. At that particular meeting that was about all that was discussed, was the meeting of the Granges.

Q. I believe you said this meeting lasted two hours, or approximately two hours?

A. That is right.

Q. What was the discussion that took two hours at that time?

A. Well, from the activities the Grange was going through, it could have taken longer than two hours to discuss that.

Q. Tell us what you discussed and what was said.

A. He stated the Granges were holding meetings at different places,—I think the first was at York,——

Q. Who said that?

A. Mr. Weston. And it would be impossible for us to negotiate with the feeling they had toward the shippers, and that matter would have to be cleared up before we could get any further with the negotiations, for there had never been anything to start with. [202]

Q. Was there any discussion of what had taken place at the York meeting?

(Testimony of L. W. Owen.)

A. Yes, there had been certain resolutions that was passed where the farmers would refuse to sell any merchandise to a shipper or a firm that negotiated any contracts with us, without a farmer's representative being on the negotiating committee.

Q. Did Mr. Weston report to you whether or not he had attended that meeting at York?

A. He stated,—I understood he had, for he admitted he was.

Q. Now, what if anything, did you say at this time, you or Mr. Hansen, to Mr. Weston in response to the statements he had made?

A. I told him I didn't think the Grange had any business of sticking their nose in affairs of the Union, as we were not dealing for any employees of farm help, or farmers.

Q. Had you finished? Is that the substance of what you said, or were there any additional statements you made?

A. I might have made additional statements. Naturally there was more that was said during the conversation, but I think that is practically all I said at that meeting.

Trial Examiner Barton: Did Mr. Hansen say anything that you recall, other than what you have related? A. Yes; I think he did. [203]

Trial Examiner Barton: What was said?

A. I can't recall right now, but I know he entered into the conversation.

Trial Examiner Barton: You don't recall anything that he said?

(Testimony of L. W. Owen.)

A. Not right offhand; no.

Q. When you made your statement in substance that you weren't attempting to represent any farm workers, what, if anything, did Mr. Weston say in reply to that?

A. Mr. Weston stated we would have to recognize the farmers,—I mean the Grange, if we were going to deal at all with the shippers.

Q. Now at the conclusion of this meeting, was there any agreement reached between you and Mr. Weston in respect to any further meetings?

A. Yes; we was to hold a meeting the next day.

Q. Who was to hold a meetinf?

A. Mr. Hanson, myself and Mr. Weston, and he said he would bring one of the shippers with him.

Q. Was an appointment made for that meeting?

A. Yes, sir.

Q. Where, and when?

A. At the same place, the Rogers Hotel, at two o'clock in the afternoon.

Q. At whose request was the appointment made? [204]

A. I think it was just mutually agreed between the parties at that first meeting that we would meet the next day.

Q. Did you meet? A. We did.

Q. And were the persons present that you have named?

A. No; there was just Mr. Hansen, Ray Hansen, Mr. Farrel Hansen, Mr. Weston, and Milo Rash and myself.

(Testimony of L. W. Owen.)

Q. Just relate for us, Mr. Owen, what took place at that meeting from the beginning of it?

A. It was a reoccurrence of the meeting the day before. They still took the position it would be impossible to negotiate with us as long as the Grange and the farmers had taken the position that they would not sell any of the shippers that dealt with us, without a farm representative, and at my request I asked Mr. Weston if he could arrange a meeting with the Grange to go over the contract as we had presented it, as at this meeting of the Grange they had stated we were asking for an eighty-three and seven-tenths per cent increase in wages, which was false; also that we were asking for a thirty-five dollar a week minimum, which was also false; and I told Mr. Weston that I didn't think the contract had been gone into thoroughly at this Grange meeting, or they wouldn't have made these statements. And Mr. Weston stated that he would arrange a meeting, if possible, which was to be held on Friday night, although the [205] meeting wasn't held until Saturday night.

Q. The following Saturday?

A. That is right.

Q. Did Mr. Farrel Hansen participate in the discussion at this time? A. Yes, sir.

Q. What did he say?

A. On the March third meeting he took practically the same position as Mr. Weston had taken, that they couldn't deal with us as long as the Grange had passed certain resolutions.

(Testimony of L. W. Owen.)

Q. What other statements, if any, did Mr. Hansen make?

A. Mr. Hansen wanted to know why we had started an organization in Idaho Falls, and I stated that we had anticipated coming in here for the past two years, but this was the first we was sent in here, was the first of January; that we didn't intend to organize any of the potato workers until this fall, the fall of 1942, but certain workers had come up to us and asked that they be organized, and we put on a campaign to organize them, and practically every day there was a group that was coming up to either Mr. Hansen's room or my room to join the union. [206]

Q. Just go ahead and say anything else Mr. Hansen stated at this meeting,—which you recall that Mr. Hansen stated.

A. He didn't think we should come up here to organize the potato workers, as this was a farming community and they were getting along very good without us.

Q. Did you make any reply to that?

A. Yes; I did.

Q. What was the reply you made?

A. I told him we intended to stay here until they were all organized.

Q. Now, have you concluded your testimony as to the conversations at the meeting of March third?

A. As I recall it; yes.

Trial Examiner Barton: How long did that meeting last?

(Testimony of L. W. Owen.)

A. That meeting didn't last very long?

Trial Examiner Barton: Well, how long,—half an hour?

A. I would say an hour at the most, that meeting lasted.

Q. Prior to this time had you ever been,—prior to the [207] time of this meeting, had you ever been asked by any of the shippers to explain the contract you submitted to them, or to the farmers?

A. I had not.

Q. You mentioned in your testimony that you told Hansen,—or told Mr. Weston and Mr. Hansen at this meeting that a statement which had been made that you were asking for a thirty-five dollar minimum was false. Will you explain if you had requested any thirty-five dollar minimum, and if so, for what worker?

A. Yes; we had requested a thirty-five dollar minimum for a working foreman, and there is only one particular house in this area that had a working foreman, and he was getting paid within a few dollars of that figure, any way.

Q. What house was that?

A. L. S. Taube.

Q. With reference to the discussion that was had at the March third meeting about a meeting on Friday, which was later held Saturday, and which you attended, will you state what discussion there was as to how the arrangement for the meeting was to be made, and what persons were to be invited to the meeting?

(Testimony of L. W. Owen.)

A. As I recall, I told Mr. Weston I would like to attend a meeting of farmers and explain to them what that contract meant, as I didn't think it had been explained at the Grange [208] meetings, or they couldn't have arrived at those figures. Mr. Weston and Mr. Farrel Hansen stated they thought they could arrange that, and it was agreed it was to be arranged for Friday night.

Q. Who was to take care of inviting the people to the meeting? A. Mr. Weston.

Q. Was there any discussion as to what persons should be invited?

A. To my knowledge, I thought it was to be farmers and the leaders of the Grange, and whatever shippers wanted to attend, also.

Trial Examiner Barton: Was anything said at this meeting as to whether farmers were to be invited?

A. Yes, sir.

Trial Examiner Barton: What was said about it?

A. Mr. Weston stated he would see how many he could get to attend the meeting.

Q. State whether at the meeting of March third you stated in substance or effect that if you could not pacify the farmers you would withdraw your demand for a contract for these operations?

A. There was nothing stated that way at all, at any meeting.

Q. Did you attend the meeting on Saturday?

A. I did. [209]

(Testimony of L. W. Owen.)

Q. That was the following Saturday, March seventh, is that correct? A. That is right.

Q. Where was the meeting held?

A. At the Bonneville Hotel.

Q. Whereabouts in the Bonneville?

A. In one of the,—I imagine it would be one of the conference rooms they have there.

Q. Approximately how many people were in attendance at the meeting?

A. Between fifty and sixty, as I recall.

Q. Did you know any of them,—any of the persons there? A. Yes.

Q. Who presided at the meeting?

A. Mr. Weston.

Q. In addition to yourself, was there any other union representatives present? A. There was.

Q. Who were they? A. Mr. Hansen.

Q. That is Ray Hansen?

A. Yes, sir; Ray Hansen,—one other representative and myself.

Q. Who was the other one,—just two representatives, you and Hansen? [210]

A. Walter Graham was one,—I don't know who the other one was.

Q. Were there any workers in the warehouses present? A. There was.

Q. Were there any of the employers, the shippers, present? A. There was.

Q. And can you name any of those you recognized?

(Testimony of L. W. Owen.)

A. J. E. O'Neil, Mr. Holden,—those are two that I know was there. There was others there, also.

Q. Name any farmers you know who were present.

A. I don't know whether they are farmers, they belong to the Grange, I know that. I couldn't recall whether they are farmers or not.

Q. Give us their names.

A. Mr. Taylor, the head of the Grange.

Q. Which Taylor is that?

A. The Master of the Grange.

Q. Which Taylor is that?

A. I don't recall his first name. I know it is Mr. Taylor, Master of the Grange.

Q. Is it E. T. Taylor, of Coeur d'Alene?

A. That is the one.

Q. Do you know whether he grows any potatoes?

A. I don't think so.

Q. Now, name any others, farmers or otherwise. [211]

A. There was an officer by the name of,—an army officer by the name of Anderson, who claimed to be a potato grower prior to going into the army. At the present time that is all the names I can remember, although I have met quite a few of them since that time.

Q. Do you know a Luke Williams who is connected with the Grange?

A. I do not. I probably have met him, but I don't remember.

(Testimony of L. W. Owen.)

Q. Do you know whether he was there?

A. He might have been.

Q. Do you know a Elmer Williams?

A. No, I don't know him, only just at that meeting, was all.

Q. Was he present? A. He was.

Q. Do you know where he lives?

A. I do not.

Q. Does he live in Idaho Falls, or vicinity, do you know?

A. I haven't the least idea.

Mr. Babcock: Just a moment, Mr. Examiner. I want to refer to my notes a minute.

Q. Did anybody take minutes of this meeting?

A. Yes.

Q. Who did that? A. Ray Hansen.

Q. What was the outcome of the meeting, without going into [212] the details of the meeting?

A. It broke up in a row, right near to a free-for-all, the way it looked to me.

Q. Between whom?

A. Between Mr. O'Neil and myself.

Q. By that you mean an argument?

A. That is right.

Q. Did you and the union representatives leave the meeting before the meeting was concluded?

A. That meeting was concluded, although they were asked to stay there to hold a further meeting among themselves.

Q. Who were asked to stay there?

(Testimony of L. W. Owen.)

A. All of the ones present with the exception of the union representatives.

Q. Did the workers stay? A. No.

Q. Do you recall the names of the workers who were there at that meeting?

A. Offhand, I can't.

Q. Was there any attempt made at that meeting to negotiate any terms of the agreement?

A. No; there wasn't.

Q. Refer to the group of exhibits there, Mr. Owen. I refer you to a group of letters which are marked Board's Exhibit 24 through 29, which are addressed to various of [213] the respondents here, also another letter of similar character marked Board's Exhibit No. 20. Will you just look through those so you know what they are?

(Mr. Babcock hands papers to witness.)

A. Yes; those are letters we sent out.

Q. Did you ever receive any reply to any of those letters from any of the employers, other than Board's Exhibit No. 22, Mr. Owen?

A. Only from W. P. Wilson, is the only one.

Q. That is Board's Exhibit No. 22?

A. That is right.

Q. You did receive some further correspondence from Mr. Weston?

A. After that meeting of the seventh?

Q. Yes. A. Yes, sir.

Q. Now, will you refer to Board's Exhibit No. 22,—I believe it is 22,—a letter from Mr. Weston dated March 8th, do you find that?

(Testimony of L. W. Owen.)

A. 22 here is a letter from Wilson.

Q. No. 23 then, I guess. It is 23. I refer you to the last paragraph of that letter. Will you read that over to yourself. I will ask you whether Mr. Weston called you at any time that week?

A. He did not. [214]

Q. Did he call you at any time the following week? A. I think,——

Q. Perhaps we can shorten it this way: Refer to the letter you have there in your hand from Mr. Weston dated March sixteenth,—will you do that, Mr. Owen,—refer to the letter dated March 16th from Mr. Weston, Board's Exhibit No. 24.

A. Yes.

Q. Between the time you received the letter of the eighth and the letter of the sixteenth, did Mr. Weston call you, or did you have any conversation with him? A. He did not.

Q. When was the next time you heard from Mr. Weston?

A. It was,—he called Mr. Hansen on March 18th.

Q. Where? A. At the Rogers Hotel.

Q. Did you have a meeting with him that day, or a conversation with him?

A. We had a meeting.

Q. How was that arranged?

A. It was arranged by telephone with Mr. Hansen and Mr. Weston.

Q. For what place?

A. For the Rogers Hotel.

(Testimony of L. W. Owen.)

Q. At what time? [215] A. Two o'clock.

Q. Did Mr. Weston meet you that day?

A. He did, at four o'clock in the afternoon.

Q. Where? A. At the Rogers Hotel.

Q. Did you wait for him during that time?

A. I did.

Q. What was discussed at that,—pardon me,—
what persons were present at that meeting?

A. Mr. Hanson and myself.

Q. And Mr. Weston? A. That is right.

Q. Anyone else,—any of the employers there?

A. No.

Trial Examiner Barton: You refer to Ray Hansen, do you?

A. That is right, Ray Hansen.

Mr. Weston: What was the date of that meeting?

A. The eighteenth.

Q. What subjects were discussed at that meeting?

A. At that meeting Mr. Weston stated that he didn't think we had the majority in some of the sheds, and I told him we would present applications, or proof whenever we started negotiations.

Q. And did he give you the names of the sheds in which he [216] said you didn't have a majority?

A. The only one he said was Hurley.

Q. Proceed and relate what was said at the meeting there with respect to this matter, these cases.

A. He wanted to know how we were going to

(Testimony of L. W. Owen.)

negotiate, and I stated that I thought we should negotiate the way the contracts had been presented to the shippers, and he asked me which one was presented first, and I told him W. P. Wilson's. He said they were going to insist that we negotiate the Potato Association's contract first. I stated I thought it was only fair that we negotiate the way the contracts had been presented, not by picking out one particular plant. It also drifted back to our majority in these sheds. Mr. Weston stated there was some others that he didn't think we had a majority in, but he only named Hurley and he stated he would give us proof of the names of other sheds he wanted to know whether we had a majority in.

Trial Examiner Barton: What do you mean when you say "shed," now?

A. Well, these potato shippers, their places, to my knowledge, have been known as sheds throughout the country.

Trial Examiner Barton: Is that any different, to your knowledge, from the warehouses that have been mentioned here?

A. No, sir. [217]

Q. (By Mr. Babcock) Go ahead, Mr. Owen.

A. Up to the present time the only one that Mr. Weston asked us about was Hurley, although we found out we didn't have the majority in two or three others, and withdrew those.

Q. Well now, was there anything said at this meeting with respect to an industry-wide election?

A. Yes, sir.

(Testimony of L. W. Owen.)

Q. How did that come up, and what was said?

A. I don't know exactly how it occurred, but I asked Mr. Weston if the shippers would consider a unit election covering this area; he said he didn't think so, but that he would have a talk with them and let me know.

Q. I am not asking you that. I am asking you whether at this meeting on March 18th there was any discussion among you as to when negotiations were to start, or how they were to be conducted?

[218]

A. Yes. Mr. Weston stated that we should start with the Potato Co-op, and we had quite a discussion over that one. It was dropped. He stated also he thought we could get further by starting negotiations by mail, and I stated that it would be impossible to ever finish negotiations if we were going to have it by mail. He also stated that he had submitted a counter proposal to us.

Q. A what?

A. A counter proposal. I said I had received no counter proposal whatsoever.

Q. Was that in this case, or in the creamery case? A. It was discussed at that time.

Q. Was that supposed to be a counter-proposal in the potato cases? A. In the creamery case.

Q. Let's not go into that.

A. But it was discussed at the time. At all of our meetings it would eventually juggle back from potatoes to the creamery, and we were getting no

(Testimony of L. W. Owen.)

place whatever in any of [219] the meetings so far as negotiations were concerned.

Q. Mr. Owen, will you refer again to the letter of March sixteenth that you have there,—I think it is Board's Exhibit No. 24. A. Yes.

Q. The third from the last paragraph in the letter, and particularly to the statement there, "There are three or four others in this same category whose names I do not have. I will send them to you in a day or two,"—do you find that?

A. Yes, sir.

Q. Did Mr. Weston ever send you the names of these other operations? A. He did not.

Q. Or ever give them to you orally?

A. He did not. [220]

Q. Now, you refer to a letter dated March twenty-third,—is there an exhibit number on it,—from Mr. Weston to you?

A. March twenty-third,—31 is the exhibit number.

Q. 31? A. That is right.

Q. I refer you to the last paragraph of that letter in which it is stated, "I will see you Thursday or Friday." I will ask you to state whether Mr. Weston called you on Thursday or Friday of that week? A. No.

Q. Were you in Idaho Falls? A. I was.

Q. When? For what period?

A. I was here for three or four days at that time.

Q. Did you attempt to locate Mr. Weston?

(Testimony of L. W. Owen.)

A. I did.

Q. What did you do in that respect?

A. I called Mr. Trask; also called the Bonneville Hotel.

Q. Did you eventually receive any word from Mr. Weston? A. I think I did on,—

Q. According to the calendar Thursday and Friday of that week were on the 26th and 27th.

A. I did not.

Q. Did you on Saturday receive a note from Mr. Weston? A. Yes. [221]

Q. Do you have that note?

A. No; I haven't.

Q. Do you know where it is?

A. I think it is in your files.

Mr. Babcock: I have no record of it. Do you have a copy of that note, Mr. Weston?

Mr. Weston: No.

Q. Will you state what the note said, in substance?

Trial Examiner Barton: I want to be sure of this: Is this a note from you to Mr. Weston?

A. No, from Mr. Weston to Ray Hansen; it was not to me.

Q. Did you see it?

A. I saw the letter; yes.

Q. What day did you see it?

A. I think it was on a Saturday that I saw the letter,—Saturday or Sunday.

Q. What, in substance, did it say?

(Testimony of L. W. Owen.)

A. It stated that he had to leave, go back to Boise, and would call us, or write us from there.

Q. Now, refer to the letter dated March 31st from Mr. Weston, Mr. Owen, and give us the exhibit number on it.

A. 32 is the exhibit number.

Q. Refer to the last paragraph of that,—the next to the last paragraph of that letter,—the middle paragraph. I will ask you to state whether Mr. Weston notified you, or [222] got in touch with you on the following day, or thereabouts with reference to a meeting,—with reference to arranging a meeting?

A. He did not.

Q. Before we get to that, will you refer to Board's Exhibit No. 33, which purports to be a copy of a letter from Mr. Weston's secretary to Farrel Hansen,——

A. I remember this, although we did not have any meeting.

Q. Did you receive that copy? A. I did.

Q. Did you see Mr. Hansen about this time,—when did you see him?

A. I saw him the day I received the letter.

Q. Where did you see him?

A. I saw him the day I received the letter.

Q. Where did you see him?

Trial Examiner Barton: That letter you are referring to now is dated April 3rd, is it?

A. That is right.

Trial Examiner Barton: And you saw him the same day?

(Testimony of L. W. Owen.)

A. The day I received the letter.

Trial Examiner Barton: You received the letter a day [223] or two later?

A. I think it was the next day I received the letter.

Trial Examiner Barton: All right.

Q. (By Mr. Babcock) Was the letter sent from Mr. Weston's office in Boise?

A. I don't recall whether it was or not.

Q. Where did you see Mr. Weston?

A. I saw Mr. Weston in front of the Bonneville Hotel.

Q. Did you have an opportunity to talk to him?

A. No; I didn't.

Q. Did he call you, or get in touch with you, at that time? A. He did not.

Q. Did he, thereafter? A. He did not.

Q. Did you at that time file charges,—or about that time, against these respondents, as indicated in your letter, Mr. Owen? A. I did.

Q. At the same time did you also file charges against the other employers that have been named here, to whom contracts were sent, with the exception of Henry Hurley? A. I did.

Q. Was there a charge filed in the case of Mr. Hurley? A. There was. [224]

Q. Mr. Hurley, I said. A. Hurley? No.

Q. Were the other charges you filed, on the other employers not involved in this case, later withdrawn by the union? A. They were.

Q. What was the reason for that?

(Testimony of L. W. Owen.)

A. We did not have the majority.

Trial Examiner Barton: Just a minute. Do you remember as to how many employers you withdrew charges?

A. I don't recall right off-hand. I think it was about four, wasn't it.

Mr. Babcock: I can tell you in just a second, Mr. Examiner.

Trial Examiner Barton: I just wanted to know, approximately.

A. Four or five. [225]

Q. (By Mr. Babcock) In the case of the Atlantic Commission Company, was there a charge filed there? A. Yes.

Q. Was that withdrawn subsequently?

A. It was.

Q. And for what reason?

A. As we reached an oral agreement.

Q. When did you next meet with Mr. Weston?

A. Pertaining to the potato cases, you mean?

Q. Pertaining to any cases?

A. Around April the 18th at the,——

Q. Was that on the potato cases or something else? A. No, that was on the creamery case.

Q. Was the potato cases discussed?

A. At that meeting, no.

Q. When was the next time that you met with Mr. Weston to discuss the potato cases?

A. It was quite a while after that. I don't re-

(Testimony of L. W. Owen.)

call the date but it was quite some time after that that we met him again.

Q. How long ago was it?

A. It was around some time last month.

Q. October? A. October. [226]

Q. Between the time that you next met with him and the time that you had met with him last in April, or March, had you received any communications from him relative—either written or oral, other than the ones we have in evidence here?

A. No.

Q. Had he ever attempted to arrange a meeting to negotiate with you?

A. Not with me he hadn't.

Q. Or with any representative of the majority union? A. Not that I know of.

Q. Now, referring to these meetings in October, explain how they came about and how they were arranged?

A. What brought them about was when we was in negotiations with the creameries. After the settlement of that I asked Mr. Weston why we couldn't get together and sit down and settle the potato deal the same as we had the creamery, the same way. And he stated that he felt we probably could. And he arranged to have a meeting on the potatoes. We met up in Mr. Hansen's [227] room in the Rogers Hotel.

Q. You were talking about the settlement on the creamery deal; did that take place on that last

(Testimony of L. W. Owen.)

Board hearing on that complaint against the creameries? A. That's right.

Q. And was it at that time that you first mentioned to Mr. Weston a possibility of further negotiations in these potato cases?

A. That's right.

Q. The hearing in that case, in the creamery cases, Mr. Owen, was concluded on September 26th?

A. Yes.

Q. Does that refresh your recollection as to the exact dates that you first met on the potato cases after that?

A. First meeting was held on a Monday. That is why I was just wondering what Monday it was there.

Q. And where was it held and with whom?

[228]

A. At the Rogers Hotel.

Q. And with whom?

A. There was Ray Hansen, Mr. Weston and myself at that meeting.

Mr. Weston: It was October 5th.

Trial Examiner Barton: You are agreed it was October the 5th?

The Witness: Well that is what I thought it was.

Trial Examiner Barton: All right then, go ahead.

Q. (Mr. Babcock): Go ahead and tell what took place at that meeting, or, first, how was the meet-

(Testimony of L. W. Owen.)

ing arranged, or who made the arrangement for the meeting?

A. If I am not mistaken the meeting was arranged between Mr. Weston and myself by phone; I don't recall exactly.

Q. Now, tell us what took place at the meeting, what was said at the meeting?

A. It was discussed about negotiating agreement for these [229] potato sheds and that a committee had been appointed to meet with us.

Q. Who said that? A. Mr. Weston.

Q. A committee of whom, from whom?

A. Of shippers.

Q. Did he give you the names?

A. At that time I don't think he did. I don't recall that he did but I don't think he gave us the name of the committee at all. And stated that he would,—they would be willing to meet with us and I told him that I had asked Brother Al May in from Salt Lake City to,—

Q. (Interposing): What is his position?

A. International Representative.

Q. For your International Union?

A. That's right. And a meeting was arranged for Wednesday, which was the 7th.

Q. Of October? A. October.

Q. Was the meeting held?

A. The meeting was held.

Q. Where was it held?

A. It was held at the Rogers Hotel in Mr. Hansen's room there.

(Testimony of L. W. Owen.)

Q. And who attended the meeting? [230]

A. There was Mr. Al May; Mr. Hansen and myself; Mr. Weston. I think both of the Mr. Holden's. Mr. Stanger; Mr. W. P. Wilson; and Mr. Carl DeLong.

Q. Was Al May at that meeting Mr. Owen?

A. No; no, Mr. May wasn't; I just was thinking, he was not at that meeting.

Q. How many meetings did he attend in the potato matters? A. One.

Q. When was that, after this meeting or before? A. It was after this meeting.

Q. All right. Now relate what was said at the meeting on the 7th and by whom it was said and the substance of what was said?

A. Principal topic of discussion was over this pirating of labor.

Q. Well Mr. Owen, if you will attempt to tell us in substance what was said in the sequence that it took place at the meeting and tell us how the meeting started and then what was said in sequence?

A. Well, the meeting started late, on account of Mr. Weston could not be there till about 4 o'clock and the meeting started about 4 o'clock or thereafter. It was called I think originally for around 2 o'clock. Although there was different talks, there was talk of this pirating of help, and it was stated that we could, what we could do to stop this pirating of [231] help. I stated how it was done on our defense jobs; then I just don't recall exactly who was

(Testimony of L. W. Owen.)

doing all the talking and all what was said, but that wasn't the whole thing, but I do remember the conversation, whether it was Mr. Stanger said it or Mr. Holden,—them two did most of the talking,—but that was discussed at the meeting and,—

Q. (Interposing): You mentioned the question of pirating, what was said about that, what was the problem?

A. The problem was that it was getting the wages up so high in some of these places it just wasn't known where it was going to stop. It was originally agreed,—or Mr. Holden said it was originally agreed they were to pay 70 to 75 cents an hour at the beginning of the season.

Q. Agreed among whom?

A. Agreed among the shippers.

Q. What else did he say?

A. But at the present time there was some of the houses was paying as high as 90 cents an hour and he stated he had met with Mr. Taylor the day before, and he told me that he had lost five of his men where other houses had offered his workers a nickel an hour more than his house was paying.

Q. What Mr. Taylor was that?

A. He was from the Atlantic Commission Company. It was agreed that they would hold a meeting amongst themselves and they would meet with us again. [232]

Q. Was there any discussion of the terms of an agreement, as to the actual terms of an agreement?

(Testimony of L. W. Owen.)

A. Not at that meeting, no. There was a discussion on what they thought the wages was that should be paid in this locality, but there was nothing pertaining to an agreement whatever.

Trial Examiner Barton: Was anything said at all about the proposed agreement you had sent out to the various shippers?

The Witness: Nothing at that meeting, only in regards to,—was a discussion that was had over paying the men from time to time, when they left the sheds to go to the cellars, on the time out and until they returned to the shed. There was a discussion over that and Mr. DeLong stated that he thought that they would be willing to pay one way. Or we allow 15 minutes to go to the sheds and return.

Trial Examiner Barton: Did you tell those present that you wanted an agreement?

The Witness: I said that all the time.

Trial Examiner Barton: You said that at this meeting?

The Witness: At practically every meeting I said that. At this particular meeting I said that we wanted an agreement and Mr. Weston asked me what we wanted in return if we would stop this pirating of help and I stated we were asking for nothing at the present time.

Q. (Mr. Babcock): Was there any discussion of the problem of [233] hiring and how the Union could assist in that? A. Yes.

Q. What was the discussion in that respect?

(Testimony of L. W. Owen.)

A. Well I forget now who it was said it, but one of them asked how we could help stop this pirating and I said how we had stopped it both at the airport and at the gun plant in Pocatello.

Q. Was there any discussion as to what form and what length of an agreement should be, what it should be, in case you negotiated one?

A. Yes. Mr. Weston stated "Why were we so anxious to have such a long agreement?" and I told him that is the, the agreement was plain enough and had it in there, two paragraphs would be enough, would be as much as we wanted, would have it in that much.

Q. At this meeting did Mr. Weston or any of the representatives of the employers raise any question about your majority in any of the operations? A. None.

Q. Did you have a further meeting after this?

A. We did.

Q. When was it held? Approximately when?

A. It was only a few days after the,—it was the next week I think, on the 12th.

Q. Where did this take place?

A. That was also held at the Rogers Hotel.

[234]

Q. Who was present at this meeting?

A. Mr. Hansen,—Ray Hansen; Mr. Al May; Mr. Weston and myself.

Q. None of the employers, the shippers, were present at that time? A. No, there wasn't.

Q. Relate the discussion that took place at that meeting?

(Testimony of L. W. Owen.)

A. We presented Mr. Weston with a contract. We told him it was something to start on and he said he thought we had said we were going to be satisfied with a two-paragraph contract, and I stated there was a lot of things in this contract that probably could be cut down, minimized; that the shorter the contract was that the better it was with us. He looked over the contract and stated that he thought that there should be no objections from any part, in that contract, although there was the matter of the closed shop that he was not in favor of. But that he would take the contract with him and draw up a counter-proposal and mail it to us, which he has not done.

Mr. Babcock: Will you mark this?

(Whereupon, document hereinabove referred to was marked as Board's Exhibit 39 for identification.)

Q. (Mr. Babcock): Handing you what has been marked Board's Exhibit 39 for identification I will ask you whether that is the proposed contract that you submitted at that time?

A. Yes. [235]

Mr. Babcock: I offer this in evidence. Do you have a copy, Mr. Weston?

Mr. Weston: No objection.

Trial Examiner Barton: Admitted.

(Whereupon, Board's Exhibit 39 was received in evidence.)

(Testimony of L. W. Owen.)

BOARD'S EXHIBIT No. 39

Wage Scale and Agreement

Agreed to and to be in effect between the.....
of.....and the I. B. of T. C. W. & H. of
A., Local ofand.....
vicinity of....., hereinafter referred to as
the Union.

Article I

Section A. That Whereas, the parties hereto desire to encourage and promote a cooperative and mutually satisfactory relationship between Employer and the members of the Union employed by such Employer with respect to conditions of employment and to prevent strikes and lockouts and to provide for the peaceable solution of all disputes which may arise between Employer and said employees.

Now Therefore, in consideration of the promises, covenants and agreements of the other, each of the parties hereto agrees as follows:

The management of the work, and direction of the working forces including the right to hire, suspend, or discharge for proper cause, and the right to relieve employees from duty is vested exclusively in the Employer, provided that this will not be used for purpose of discrimination against any member of the union.

It is provided further that the Employer shall have a full thirty days trial period for new help within which to decide whether his services will

(Testimony of L. W. Owen.)

be continued or whether he will be discharged, but that upon the expiration of thirty days if he is retained in the Employer's service, he must become a member of the Union. Employees must be members in good standing in the Union.

Section B. The employer hereby reserves the right to discharge any man or men, woman or women in his or its employ furnished by the Union to them, if the work is not satisfactory to the Employer. Any man or woman under dispute may appeal to the Manager or the Union, or both.

Section C. No employee member of the party of the second part, who, prior to the date of this Agreement was receiving more than the rate of wages designated in this schedule, or working under more favorable working conditions, than contained herein for the class of work in which he or she was engaged, shall suffer a reduction of wages or work under less favorable conditions through the operation or because of the signing of this Agreement.

Section D. All work performed on Sundays, New Year's Day, Decoration Day, Fourth of July, Labor Day, Thanksgiving Day and Christmas Day, or days observed as such, shall be paid at the rate of time and one-half of the regular hourly rate provided, however, that employee assigned regularly to Sunday or holiday work for the continuous operation of the company's business will be compensated at the regular rates.

In the event employee is assigned other days than

(Testimony of L. W. Owen.)

Sundays or holidays as his or her day off, and is then required to work on said assigned day off, he or she shall be compensated for all work performed on said day at the rate of his or her regular rate of pay, plus one-half ($\frac{1}{2}$) his or her regular rate of pay, in addition to his or her regular hourly or monthly wage.

Section E. Employees covered by this Agreement, when drafted for Military Service, shall be reinstated upon their release from such service in accordance with the provisions of the Selective Training and Service Act.

Section F. Both Parties hereto further recognize and agree that industrial peace is to be desired at all times in the area covered by this Agreement, and to that end it is agreed.

1. That for the purpose of adjusting differences or controversies relative to the application or interpretation of any of the provisions of this Agreement, a board of arbitration is hereby created, to consist of two representatives of each party hereto.

In the event that agreement cannot be reached, a fifth party shall be selected who shall be a part of said board of arbitration. The findings and decisions of said board of arbitration shall be final upon both parties of this Agreement.

2. Any complaint or other matter for consideration of the board of arbitration shall first be investigated by the party hereto repre-

(Testimony of L. W. Owen.)

senting the person making the complaint, then filed in writing, with all supporting evidence, with the board of arbitration, and such board of arbitration shall be required to render a decision in not to exceed seven (7) days, not including Saturdays, Sundays or legal holidays.

3. The board of arbitration as hereunder set forth, shall not handle negotiations for a new agreement or changes in the wage scales, hours of work, or working conditions, which are a part of this Agreement.

Section G. All benefits and privileges now in effect concerning the employees shall continue and extend to all new employees.

Section H. Present employees of the Employer whose earning capacity is limited because of age or physical handicaps, may be employed where practicable, on light work at a wage suitable to the Employer and the Union.

Article II

Section A. Regular employees shall mean men and women employed in potato warehouses who have assignments of work in the normal course of the operation of the various systems employed and who are not subject to daily dispatch through the office of the Union.

Section B. The hours worked under this agreement shall be consecutive from the time employees are ordered to report to duty and continue until

(Testimony of L. W. Owen.)

relieved from duty, and shall comply with all Federal and State laws.

Section C. Employees called to work shall receive not less than four hours' pay or four hours' work, time to start when ordered to report for work. Inclement weather or other conditions beyond the control of the Employer, the employees then shall only be compensated for the actual time worked. It is not intended that this provision shall apply when employees are required to work additional time in excess of the regular working day; such additional time in such case may be less than four (4) hours. All men and women shall be notified the night before, of any change in starting time.

Section D. The pay shall start for all country crews and shall continue from the time they depart from a designated point and until they return to a designated point at quitting time.

When employees travel in the service of the Company, they shall receive eight (\$.08) cents per mile on their car plus adequate insurance coverage.

Section E. When it becomes necessary to reduce the working force of the Company, seniority shall prevail with respect to all regular employees, qualifications being equal.

In rehiring, seniority shall prevail, and practice will be that the regular employee with the longest service record and qualifications being equal with said Company will first be rehired.

Further, no new employees will be hired until

(Testimony of L. W. Owen.)

all former available competent and regular employees employed at the time of the signing of this Agreement have been afforded an opportunity to return to work.

Wage Scale

The wage scale shall be as follows:

- #1. Head Grader Man and Working Foreman90c per hr
- #2. All other male employees.....85c per hr
- #3. All female employees70c per hr

Section F. Female help may be employed subject to the Idaho law covering the employment of women, which provides no female shall be employed more than nine (9) hours in any day; and that the Employer shall provide suitable seats for them and shall permit the use of such seats by them when they are not engaged in the active duties for which they are employed.

Article III

This Agreement is to continue and remain in full force and effect and to be binding upon the respective parties hereto from October 2, 1942, until October 2, 1943 except that either party may open Article II of this Agreement covering wages, hours and working conditions upon thirty (30) days written notice given the other party requesting modifications. In the event no notice given then this

(Testimony of L. W. Owen.)

Agreement shall remain in full force and effect for a period of an additional year.

TRUCK DRIVERS & WARE-
HOUSEMEN LOCAL UNION
NO.

By

By

Employer.

By

Dated this day of, 1942.

Q. (Mr. Babcock): Now, what else was discussed at this meeting, Mr. Owen?

A. Mr. Weston wanted to know if,—how we were going to stop this pirating. I explained that,—and also Brother May explained to him,—that on all our defense jobs that each man was given a termination slip when he left a certain job and that had to be turned in when he applied for a new position in that area. On this termination slip it stated why they were,—either dismissed or why they quit and by that kind of method we thought we could stop these people from changing around on these different jobs. But the only way that it would be effective would be through a check-off system, where we would have the man coming to our offices before he was given employment in any of the sheds in this locality. Mr. Weston stated he thought that would be the solution to stop the pirating up here. The meeting adjourned with Mr. Weston stating that he would

(Testimony of L. W. Owen.)

submit a counter-proposal to us, which he has never sent.

Q. Was there any discussion at this meeting of the provisions and the different paragraphs of this agreement you had submitted?

A. There was. [236]

Q. Paragraph by paragraph?

A. Yes, there was.

Q. Other than the paragraph regarding the closed shop did Mr. Weston make any particular objection?

A. I think there was one other objection in the contract and we agreed to either cross it clear out or modify it.

Q. Do you know which one that was?

A. Not off-hand. I could tell by looking at the contract I think.

(Mr. Babcock hands witness document.)

A. (Continuing): It was also agreed to take out some in here that were not essential to the contract, especially one where it pertains to anyone leaving, being drafted, would receive their job back, which is a Government order anyhow for that matter and on the arbitration clause that was to be modified; I think that was all.

Q. What arrangements were made for further meeting, if any?

A. There was not meetings arranged. Only arrangement was made that Mr. Weston would draw up a counter-proposal and submit it to us.

Q. Well now when did you next have any contact with either Mr. Weston or the Committee of the shippers?

(Testimony of L. W. Owen.)

A. It was about a week ago, the next one that we had.

Q. And what was the nature of that one? How was that arranged?

A. I received a letter from Mr. Weston. [237]

Q. You are referring to the letter marked Board's Exhibit 35? A. That's right.

Q. Well before you saw that letter did you have any telephone conversation with Mr. Weston about any further meeting or any discussion with him about a further meeting?

A. Talked with him over the phone, but I don't know as it was pertaining to any other meetings of the potato case.

Q. Does it refresh your recollection that a meeting was tentatively arranged for on October 19th and later was postponed? A. That's right.

Q. Tell us about that then and how it happened, what happened?

A. A meeting was arranged for the 19th, which was on a Monday but was postponed.

Q. First, how was it arranged; between whom and how?

A. It was arranged between Mr. Hanson and Mr. Weston,—it was postponed for the reason that Mr. Holden and Mr. Farrel Hansen had to go to Washington regards to the price ceiling of potatoes.

Q. Well who told you that; how did you know that? A. Mr. Weston, he told,—

Q. To whom did he tell it to?

A. Mr. Hansen.

(Testimony of L. W. Owen.)

Q. Was that a personal conversation or a telephone conversation? [238]

A. To my knowledge it was a telephone conversation.

Q. Now following the receipt of the letter you have just referred to dated October 24th, did you have any further conversation with Mr. Weston, regarding, in regard to negotiating a contract?

A. No.

Q. This is Board's Exhibit 35. Did you or Mr. May,—was this with respect to the potato cases?

A. Not exactly pertaining to the potato deal, no.

Q. What did it pertain to?

A. It pertained to,—there was some discussion over the potato,—the meeting that we had with Mr. Weston was pertaining to the National Laundry in Pocatello, Idaho.

Q. When was that?

A. October the 26th, as I recall; that right, the 26th?

Mr. Weston: I agree that that is probably the date.

Q. What was said at that meeting with respect to the potato cases?

A. Mr. Weston stated that he thought we was getting along very good. That since these charges were filed they were going to go on through with the hearing and there was no use of having any further meetings as far as negotiations, although afterwards he stated that he thought that if it was

(Testimony of L. W. Owen.)

postponed,—this hearing,—that we could reach an agreement.

Q. Anything further? [239]

A. I told Mr. Weston that if we would get down to negotiations we probably could finish it before the hearing, which he stated all his time would be taken up preparing this case.

Q. Was that the extent of the conversation so far as it related to the potato cases?

A. That's right.

Q. Did you and Mr. May have a conversation with Mr. Weston on the 28th, the day I first arrived in town?

A. I thought it was on the 26th that that conversation was at; it might have been the 28th. It was the 28th, because as I recall *not* the Building Trades was to meet on that night; it was on the same night as the meeting.

Q. Was that the meeting you testified to just now?

A. That is correct.

Q. At that time and any subsequent time did Mr. Weston mention to you that he would call a committee of the shippers together and try to arrange for a meeting?

A. Not right at that time he did not.

Q. Did he at any subsequent time?

A. Not to my knowledge.

Q. Now, at any of these meetings that you testified to in October, did Mr. Weston or any of the shippers at that time state in substance or in effect state they did not believe you had a majority in your operations or ask for proof of that?

(Testimony of L. W. Owen.)

A. They did not mention it, outside of the letter mentioned [240] of Mr. Weston's, but never any discussion about that.

Trial Examiner Barton: Was there ever any discussion about the unit in any of the meetings?

The Witness: To my knowledge, no. [241]

Cross Examination

Q. I will ask your Mr. Owens, have you ever, through certification or otherwise informed us of your 51 per cent in any of these occasions?

A. Yes, on numerous occasions in our meetings I stated that we had over 51 per cent in most of the,——

Q. (Interrupting) Well that is not an answer to my question. I am asking if you have ever shown us the applications, or otherwise by certification that you have established that fact?

A. I stated that when we went into negotiations with any particular shed or sheds that we would produce applications as proof of our 51 per cent.

Q. Do you take the position then we should negotiate first before you show that you have the 51 per cent?

A. No, I take the position that we should at least decide we are going to negotiate before we present the evidence.

Q. But you have never given us that information to date, have you?

A. Because we have never sit down to negotiate on any [244] particular shed.

Q. Well I don't want an argumentative answer, I want an answer either yes or no to my question.

(Testimony of L. W. Owen.)

Have you ever given us that information to date?

Trial Examiner Barton: Well whatever the reason is, you have never presented the application cards?

The Witness: That is right. [245]

Q. I just wanted to clear the record was all. Now, let's come down to October. I believe if we can get these dates straight we can agree on them and I believe the meeting with the committee was on October 5, which was a Monday; does that correspond with your recollection?

A. No, my understanding was we met with you first on a Monday.

Q. Well,—

A. (Interposing and continuing): And you stated that you just came from a committee,—from a shippers' meeting and that they appointed a committee to meet with us. Now that is the way I understood.

Q. Now regardless of the date we will have to fix it some other way. At the meeting the committee was present they consisted of C. R. Holden, Bert Stanger, Mr. Wilson and you were present and Ray Hansen and Carl DeLong and myself?

A. That's right.

Q. Mr. May was not at that meeting?

A. That's right.

Q. The discussion at that meeting centered around the discussion of the pirating of labor; the question of unjustified or unusual increases in wages or wage wars between these shippers and we also had copies of the contract at that meeting

(Testimony of L. W. Owen.)

[249] to discuss; there were contracts that were brought out of different files; didn't you bring out one and didn't Mr. Hansen bring out one?

A. No, he didn't; he didn't have any contracts with him, or with me at all at that time.

Q. Isn't it your recollection some contracts were brought out for discussion?

A. There was some, yes.

Q. In fact, at that meeting didn't someone suggest let's take a look at this contract and see what is in it?

A. Yes, but that was,——

Q. (Interposing) Didn't they go into the question of these employees going to work in the mornings and not going to pay,——

A. (Interposing) Yes.

Q. And taking them to the sheds, when they went to work; who should pay for this?

A. Yes.

Q. I believe we also discussed arbitration clause?

A. That's right.

Q. I don't believe we got on the closed shop at all as it was a night meeting and,——

A. (Interposing) Yes, for the record, it was held at 8:30.

Q. And at that meeting on the question of the length of the contract you said via the proper gesture that all I want is a short two-paragraph contract? [250]

A. No, I stated that as far as we were concerned that these lengthy contracts originated from your lawyers.

Q. I recall that very distinctly.

(Testimony of L. W. Owen.)

A. Not from the labor organizations and if the proper verbiage was put in it we would just as soon have two paragraphs.

Q. That's right. In other words we were discussing the advisability of a very short contract?

A. That's right.

Q. I believe you made some suggestion to the effect that it be just a little working agreement between the parties, was all you wanted; just to set out the wages and hours?

A. The wages and hours and the working conditions and I guess I will have to use your term, "closed shop."

Q. Are you sure the words "closed shop" were used there that night? Used at all?

A. I am not sure about that at all.

Q. So that you are not sure about that last statement?

A. No.

Q. Now, at that meeting,—strike that please. How long would you say that meeting took; didn't it go till along around 11:30, somewheres around there?

A. No, I know it was not that long; we was at Pocatello at five minutes to 12:00 and Mr. Hansen left to go to Ogden then so, there is a 35-mile speed limit now you know, he would have to go slower than that. [251]

Q. Probably around 10:30 we got through then?

A. I think around 10:00 o'clock.

Q. At that meeting we had a very free discussion on these things?

A. That's right.

Q. And you asked Mr. Hansen at that meeting

(Testimony of L. W. Owen.)

to go ahead and call the employees together for a Wednesday night meeting? A. Yes.

Q. And you said you would take up the matter to stop this pirating? A. Yes.

Q. And you said you would discuss with those employees that night a stabilizing of the wage, at 75 cents or 80 cents yourself? A. That's right.

Q. And Mr. Hansen at that meeting told you, discussed how to get the meeting ready?

A. That's right.

Q. Now, isn't it also a fact that at that meeting we agreed to take care,—to take the matter up with the other Respondents of this case? A. Yes.

Q. And discuss it, the meeting, with them and you would then report to them the progress you had made with the employees?

A. That's right. [252]

Q. And you would give to them the usual argument that,— A. (Interposing) Yes.

Q. And the next time I met with you Mr. May was at the meetings? A. Yes.

Q. And do you recall at the next meeting I mentioned this short contract? A. Yes.

Q. And Mr. May gave me, at this second meeting, this contract, or a copy of this contract which has been introduced here as Exhibit 39?

A. That's right.

Q. And that has three pages of it?

A. That is right.

Q. And has the closed shop in it?

A. That's right.

Q. And a long arbitration clause in it?

(Testimony of L. W. Owen.)

A. That's right.

Q. Isn't it true you also suggested at that meeting they should have the check-off?

A. Yes, I think that was brought about.

Q. As a matter of fact, we brought into,—it was agreed, did we not, we did not see where the check-off would be necessary to assist in the stopping of this pirating? A. That's right. [253]

Q. So the check-off was just an incident at this meeting. Now, at this second meeting didn't I agree that we would have to come over as a committee because of the progress we were making and appear before the other respondents and discuss the matter with them; to refresh your memory, do you remember some such expression that you could tell your story and those that wanted to work with you could go with you and those that didn't want to work with you didn't have to go with you?

A. I think that you mentioned that you would take it up with the shippers and would let me know if I should come over and tell the story to the shippers, but there was no definite appointment made.

Q. Well now, not to be argumentative, but to refresh your memory, didn't I tell you and Mr. Hansen and Mr. May that had come up the Monday before so I could discuss this with you further and go to the meeting then?

A. That's right.

Q. And Mr. May was quite anxious to go to the meeting? A. Yes.

Q. And I think I called on the phone or wired

(Testimony of L. W. Owen.)

Mr. Hansen, I forget which now; these men were out of town; that it would be practically useless to have the meeting? A. That's right.

Q. So that practically winds up the negotiations and discussions we had on the contract. [254]

Trial Examiner Barton: Well then did you or Mr. May appear at one of these Monday meetings?

The Witness: No, the meeting was cancelled or, it was on account of Mr. Holden and Mr. Farrel Hansen, they had to go to Washington at that time.

Trial Examiner Barton: So that is the one you mentioned that had to be cancelled?

The Witness: Yes, that's right. [255]

Redirect Examination

Q. (Mr. Babcock) Mr. Owens, was the meeting in the early part of October that you had with Mr. Weston and the committee from the shippers the first time that you had had the opportunity to discuss the matter of a contract with the employers themselves as a committee?

A. As a committee, yes. [259]

Q. (Mr. Babcock) Prior to that time had Mr. Weston ever offered to meet with you and the employers themselves and negotiate a contract, actually discuss the terms of the contract?

A. At no time that I remember.

Q. You stated I believe that you did feel that there was some progress made at this meeting or that is was a satisfactory meeting in October, of the shippers?

A. Yes, I do think that it was some progress that was made at that meeting.

(Testimony of L. W. Owen.)

Q. During the discussion were any counter-proposals submitted by Mr. Weston or any of the employers on any of the original proposals of this agreement or contract?

A. There was no counter-proposals offered at no time.

Q. Now with reference to the subsequent meeting that was cancelled; was that to be a meeting with just a committee or with the employers, or the employers involved in this case?

A. My understanding was it was supposed to be a meeting with all the shippers.

Trial Examiner Barton: That was the Monday meeting that [260] was cancelled you are speaking of?

The Witness: That's right.

Q. That was to be a meeting of the Traffic Association, one of the Monday meetings?

A. That was my understanding, yes.

Q. And it was not to be confined to the employers represented in this case? A. No.

Q. Was that cancelled at your request or Mr. Weston's request?

A. Mr. Weston's request.

Q. And do you recall what individuals he told you were unable to be present at that meeting?

A. Mr. Holden and Mr. Farrel Hansen, he told me, was going to Washington on business.

Q. Were they the only ones?

A. That's all I was told. [261]

No. 10490

United States
Circuit Court of Appeals

For the Ninth Circuit.

IDAHO POTATO GROWERS, INC., W. P. WILSON, L. S. TAUBE, TED TAUBE and L. B. HOLDEN, Co-partners, doing business as L. S. TAUBE & COMPANY, MEYER FRIEDMAN and ARTHUR E. FRIEDMAN, Co-partners, doing business as S. FRIEDMAN & SONS, IDAHO FALLS WAREHOUSE COMPANY, ROWENA O'NEILL, Administratrix of the Estate of J. E. O'Neill, deceased, A. G. STUART, C. R. HOLDEN and L. L. HOLDEN, Co-partners, doing business as HOLDEN BROTHERS and IDAHO TRAFFIC ASSOCIATION,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Transcript of Record
In Two Volumes
VOLUME II
Pages 397 to 743

Upon Petition for Review and Petition for Enforcement of
Order of the National Labor Relations Board

FILED

DEC 31 1943

PAUL P. O'BRIEN,
CLERK

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C. R. HOLDEN,

recalled as a witness by and on behalf of the Board, having been previously sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Barton: For the record, your name is C. R. Holden?

A. That is right.

Trial Examiner Barton: And you are the same C. R. Holden who testified here yesterday?

A. Yes, sir. [267]

Q. Now, you have testified that weekly meetings are held at the Bonneville Hotel which are attended by shippers and others, and over which Mr. DeLong generally presides, is that correct?

A. I testified it had been the practice over a period of years, every since I have been in Idaho, to have weekly meetings among the railroad men, potato dealers who care to attend, and many growers, and since this new association, if Mr. DeLong happened to be there,—on many occasions he was not,—if he so happened to be there in most cases he was chairman.

Q. And these are held on Monday regularly, is that correct? [269]

A. Yes, sir.

Q. And at these meetings the shippers discuss various problems there?

A. Mostly traffic matters,—all problems in connection with the industry; yes, sir.

Q. And included among these problems will be labor problems?

(Testimony of C. R. Holden.)

A. Among these problems could be labor problems, if there happen to be any at that time.

Q. Well, have you discussed labor problems at these meetings?

A. I don't recall any Monday meetings we ever had that we discussed,—that we called particularly for labor problems, because there are a lot of outside interests at these meetings, and there is no direct labor problems discussed at the meetings,—

Q. That is not the question.

Mr. Penfield: Will you read the question, please, Mr. Reporter?

(Question read by the Reporter.)

A. We have.

Q. Did you discuss them shortly after the attempts were made to organize the workers?

A. Naturally, we probably didn't, or wouldn't have discussed them until we knew,—I don't recall any time we discussed them shortly afterwards,—I presume it was afterwards. [270]

Q. You recall a meeting at which they were discussed?

A. That is right. I just answered that question.

Q. That would be in January or February?

A. Possibly.

Q. And that would be before the contracts were presented?

A. As I recall, it was before the contracts were presented, when it was first discussed.

Q. Were they discussed after the contracts were presented?

(Testimony of C. R. Holden.)

A. Not in very many cases that I recall they were discussed afterwards, because that was handled by their attorney, Mr. Weston, after the contracts were presented. He made all contacts.

Q. It is true you had a meeting after the presentation of the contracts at which you decided to retain Mr. Weston?

A. That is true. The contracts were only presented to a very small percent of the shippers present. The rest of them were not interested, and for that reason I don't recall it was discussed openly in those meetings, because Mr. Weston was dealing with the organizer on any question pertaining to the parties to the contract that had been presented to them.

Q. Isn't it correct that following the time Mr. Weston was retained he attended subsequent Monday meetings and made reports to you?

A. He attended a few meetings. [271]

Q. And he made reports, did he not?

A. If the reports were made, they were made after the meeting, and Mr. Weston asked the people to stay who had been presented contracts,—not in the open meeting.

Q. Was Mr. DeLong present at the time these reports were made?

A. In some cases he was present; in many cases he was not. Mr. DeLong at no time represented us as far as any negotiations might be concerned.

Mr. Penfield: I move that be stricken as not responsive.

(Testimony of C. R. Holden.)

Trial Examiner Barton: You mean the last statement.

Mr. Penfield: Yes.

Trial Examiner Barton: That may be stricken.

Q. Do you recall a meeting on March seventh attended by a number of shippers and farmers and attended by Mr. Owen at the Bonneville Hotel?

A. Is that the meeting Mr. Owen called to meet with the growers,—that is the only,—if that is the date I can answer the question. If not, I don't recall any particular date.

Mr. Babcock: I think the record shows it was called by Mr. Weston at Mr. Owen's request.

A. That would be in March?

Q. March seventh. [272] A. Yes, sir.

Q. March seventh was a Saturday, was it not?

A. That is correct.

Q. There was a meeting the following Monday, a regular weekly luncheon meeting, was there not?

A. I presume there was. I don't recall that there was. I presume there was,—I can't say.

Q. Did you attend that meeting?

A. I can't say I did. That is a long time back.

Q. Do you recall attending a meeting at which the events of this March seventh meeting were discussed?

A. I don't know as I quite get your question, Mr. Penfield?

Q. Well, you say there was a meeting on March 9th, the following Monday. Do you recall,—you

(Testimony of C. R. Holden.)

stated you do not recall whether you attended that meeting or not. Do you recall attending a meeting on that date, or any other date, at which the events that occurred at this March seventh meeting was discussed?

A. Yes; I recall at some later date there was some discussion as to the meeting you speak of in March.

Q. Who was present during that discussion?

A. That would be hard to tell you. There is generally about thirty or forty attend those meetings, and I could not tell you who was present.

Q. Were the shippers named in this complaint, or representa- [273] tives of shippers named in the complaint, present?

A. I think there were possibly two of them I know that were present.

Q. Who were those two?

A. Mr. Hansen and Mr. O'Neil.

Q. And you have no recollection as to whether there were others there or not?

A. No; I have not.

Q. But there might have been?

A. They could have been,—they could all have been there. [274]

Cross Examination

Q. (By Mr. Weston) Has Carl DeLong, or the Idaho Traffic Association, ever represented you for the purpose of bargaining with the union, or discussion of labor problems? A. He has not.

(Testimony of C. R. Holden.)

Mr. Penfield: We object as calling for a conclusion, and move the answer be stricken. The facts will speak for themselves.

Trial Examiner Barton: I think you are right in a way. I think, however, if the question were perhaps worded a little differently it would be proper. I think the witness can testify whether the firm of which he is a member ever authorized DeLong to do that, or the Traffic Association.

Mr. Weston: I will re-word the question.

Trial Examiner Barton: Very well.

Q. Did your firm, either the corporation, or the present partnership, ever authorize or retain Carl DeLong, or the Idaho Traffic Association to handle any labor problems for you? [288]

A. We did not.

Q. Does the Idaho Traffic Association,—was it organized for that purpose? Did it have any purpose of that kind in mind when it was organized?

A. Not to my knowledge. If it had been, we wouldn't have belonged to it.

Q. Do you know whether the Association attempts to deal in labor problems for its members?

A. Not to my knowledge, they have not.

Q. These articles that have been mentioned here in the newspapers, was any authority ever given for the publication of those articles at any meeting at which you were present?

A. Not to my knowledge.

Q. Did you know the articles were being given to the newspapers? A. I did not.

(Testimony of C. R. Holden.)

Q. Do you know whether your employees have ever read any of those articles? A. I do not.

Q. You never authorized anyone to issue those articles for or on behalf of you or your corporation or your partnership?

A. I have never mentioned any article of that nature relative to unions to our employees at any time.

Q. Have they ever mentioned it to you?

A. They have not. [289]

Q. So far as you know, you don't know whether they have ever even read the articles?

A. I do not. [290]

Mr. Penfield: Ray Hansen.

RAYMOND L. HANSEN

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (Mr. Penfield) What is,—

Trial Examiner Barton: Your name is Ray Hansen? [295]

The Witness: I am known as Ray L. Hansen; but my name is Raymond L. Hansen.

Trial Examiner Barton: Hansen (spelling)?

The Witness: Yes, -s-e-n.

Q. (Mr. Penfield) What is your address, Mr. Hansen?

(Testimony of Raymond L. Hansen.)

A. My business address or my home address?

Q. Well, your business address?

A. 911 South State Street, Salt Lake City, Utah.

Q. What is your occupation at the present time?

A. I am organizer of the Joint Council of Teamsters number 67, headquarters in Salt Lake City.

Q. That is an affiliation of the Teamsters International Union?

A. That is an affiliation with the Teamsters International Union.

Q. What is the function of this affiliate?

A. The function of this affiliate,—the affiliate is made up of several local unions within the States of Utah and Idaho and the function of the affiliate is to organize and negotiate contracts in the areas of the various local unions.

Q. And what local unions are included in its jurisdiction? A. Local Union number 22.

Q. I don't think the numbers are necessary.

A. Local Union covering the State of Utah; there is only one Union in Utah now. Local Union covering Pocatello and Idaho [296] Falls and vicinity.

Q. That is Local Union 983?

A. Local Union 983. And a Local Union at Boise; one at Payette. That is the extent of our Local Unions.

Q. How long have you been employed by this Local as an organizer now?

(Testimony of Raymond L. Hansen.)

A. I was transferred on the payroll of the Joint Council number 67 the first of October 1942.

Q. And prior to that what was your occupation?

A. I was organizer for the Western Warehouse Council with headquarters in San Francisco.

Q. And what is,—is the Western Warehouse Council connected with the Teamsters International?

A. The Western Warehouse Council, you might say, is the Western Division of the Warehouse branch of the Teamsters organization.

Q. And what is its function?

A. Its function is a lot on the same lines as the Joint Council, to organize and negotiate contracts with the various areas of the various local unions in the eleven western States.

Q. And how long were you in the employ of the Western Warehouse Council?

A. About a *year* before I was transferred.

Q. Were you in the employ of the Western Warehouse Council [297] January 1st, 1942?

A. I was.

Q. In connection with your employment did you receive any assignment at about that time?

A. On the 27th day of December I was assigned to the Idaho area, and mainly to Pocatello and Idaho Falls. My first assignment was to help incorporate two local unions into one local union. Local Unions 440 at Pocatello and 852 of Idaho Falls.

(Testimony of Raymond L. Hansen.)

Trial Examiner Barton: That was December 1941?

The Witness: December 27, 1941.

A. (Continuing) And we brought about this incorporation and Mr. Lee Owen was duly elected and installed as Secretary-Treasurer of the new Local Union, known as 983, covering the jurisdiction of the two locals.

Q. Did you have any other duties besides the assistance,——

A. (Interposing) On the 4th day of January I was assigned to Idaho Falls to organize the creamery workers in this area.

Q. Did you proceed to Idaho Falls?

A. I arrived here the 4th day of January.

Q. And did you proceed with the organization of the creamery workers?

A. Yes. I arrived on the 4th, a Sunday, and on Monday I contacted people working in the creameries, and on Tuesday, the [298] 6th, I had my first meeting with those people and I had meetings through the week and up and until the middle of the following week, at which time I had obtained my majority in the creameries.

Q. Did anything arise in connection with the potato workers about that time?

A. On the 14th day of January a Mr. Jack Hendrickson and Carl Falk, these gentlemen contacted me at my room, on the 14th, a Wednesday, and told me that on the second day of December

(Testimony of Raymond L. Hansen.)

that they, along with others in the potato,—workers in the potato industry,—had circulated a petition among the potato workers. And that they had previously contacted the Vice President of the 4th District of the American Federation of Labor, a gentleman by the name of Keyes Blair and had been informed by him in order to get an organizer in the area that they would have to show a substantial amount of the people interested in organizing. At that time they give me these petitions and they were from various houses in this area and I told them that we would go ahead and call a meeting of the people for Friday, the 16th, and in the meantime I would contact my superiors and get permission to go ahead with the organization of the potato workers.

Q. Did you contact your superiors?

A. Yes, I contacted my superiors by long distance the next day and got permission to go ahead with my organization. [299]

Q. Did you take any steps following the receipt of such permission toward organizing the workers?

A. Well usually they pretty well depend on the organizers' ability to know whether there is enough potential members to go ahead and organize, so I had went ahead and had some pamphlets printed on mimeograph and these pamphlets were distributed.

Q. What were those pamphlets?

A. They were notice of a meeting,—

Q. (Mr. Penfield) I show you Board's Exhibit

(Testimony of Raymond L. Hansen.)

36 and ask you if this, that is a copy of the notices you prepared?

A. Yes, this is; this is one of them it looks like.

Q. The notices you distributed you stated you distributed were similar to this?

A. Yes, that is an exact copy.

Q. Was this meeting held?

A. We held a meeting and, at 8 o'clock the night of the 16th, and it was attended by members of,—or potential members from the various warehouses.

Q. About how many were in attendance?

A. Oh, I would judge right close to 150.

Q. Tell us in general what occurred at this meeting? [300]

A. Well, I conducted the meeting. I introduced myself, explained the purpose of me being in Idaho Falls. Told the group that I had been contacted by their co-workers and was asked to assist them and obtain for them contracts if possible with their employers after we had obtained a majority. Explained the workings of our organization and give them a general outline of our organization. And left myself open for questions on our organization or any other matter they might consider, or any other matter they might wish to question me about. We,—during the meeting why several of the boys rose to their feet and explained the conditions they were working under and urged the rest of the body to become members.

(Testimony of Raymond L. Hansen.)

Q. Who were some of these men that spoke in this fashion?

A. Well, the people that is most outstanding to me that I recall best is Carl Falk and Jack Hendrickson and Harold Goodell.

Q. Could you spell it?

A. Goodell (spelling) I think. And there was quite a group there from Taube and from the Idaho Falls Potato Growers. There was a substantial amount of their employees there and Milo Rash was one of the people that got on their feet there. I think as a matter of fact, was the only one that got on his feet; and he said go ahead, and he urged them to become members.

Q. Did I understand your testimony that is the substance of what these various people said, to become members? [301]

A. Yes. They urged membership in the Local and told them how they had been promised a lot in the past and that these promises were never kept and that they figured the only way they could hold an employer to his promises was through organization.

Q. Were any union applications or designations, authorities, signed at this meeting?

A. Yes. I didn't attempt,—I told the boys to think it over first; I usually do that at the first meeting, to think it over and we would have a meeting in the future soon and, but as many of them desired to sign up that night there was a group

(Testimony of Raymond L. Hansen.)

indicated their desire to sign up that night and asked if we could take their designations and authorization, and in that group I imagine there was 50 or 60 of them that signed up that first night.

Q. These were workers from various potato houses?

A. They were workers from various potato houses.

Q. Did you hold further organization meetings?

A. Yes. I went then, held the meeting on Sunday, at which time about, oh, 250 or 300 attended and,——

Q. (Interposing) Now what Sunday was that?

A. That was Sunday the 18th, the Sunday immediately following the meeting of the 16th.

Q. And,——

A. (Interposing & Continuing) And we went through about the [302] same procedure as we did on the Friday. However, we had quite a number sign up there and Mr. Lee Owen and myself was there, alone, and we was unable to take care of the people as fast as they signed up and paid up. The boys that signed up then showed a desire to be initiated as soon as they paid their money, so we had an initiation ceremony after the meeting, at which time Milo Rash and quite a group of them there was initiated.

Q. And did you hold meetings after that? [303]

A. We held meetings right through the 21st, the 25th, a Sunday, and then the 28th, and every Sun-

(Testimony of Raymond L. Hansen.)

day and Wednesday then through the month of February and up to the, a little past the middle of March.

Q. Shortly after you commenced to hold organizational meetings did you hear of any other meeting of employees of the potato shippers?

A. And on the 24th of January, a Saturday, there was four boys come up to me, to my room at the hotel; Carl Falk and Jack Hendrickson and a thin-faced boy working for Holden. I don't recall his name, and one other fellow, I think it was Harold Goodell, as I remember, come up to my room at the Rogers Hotel and told me that they had been told by their employer to attend a meeting at the City Building and I asked them what it was and they said the Association or the Traffic Association and the farmers' grange had gone together and wanted to talk to the boys from the various houses. So a representative group had been picked from each house and I said "Well how come they had it in the middle of the day when you were working?" and they said the employers had asked them to come and assured them they would not lose any time attending the meeting; they would be paid for attending the meeting.

Q. What day was this?

A. On Saturday, the 24th.

Q. About what time of the day? [304]

A. They contacted me at about 12:30; the meeting was called to order about 1:00, 1:15.

(Testimony of Raymond L. Hansen.)

Q. Do they always work Saturday afternoons in the potatoes? A. Yes, they do.

Mr. Weston: May I interrupt here just a moment. This may be a little unusual, but you stated in one of your answers that they were paid for attending; you mean while attending, don't you?

The Witness: Paid while attending, yes.

Mr. Weston: Just so I don't have to go into it on cross-examination, I thought we could correct that answer.

Trial Examiner Barton: All right.

Q. What was the purpose,—strike that. Did these employees that visited you wish you to take any action?

A. Well they come over and visited me and they were very disturbed and they told me they wasn't going to attend the damn meeting unless I was there to represent them or look after their interests and there was possibly half of the people or better that were waiting on the sidewalk out in the front of the City Building, waiting for me to arrive when we got there.

Q. Did you go in with them then?

A. Yes. I attended the meeting and sat in the back row of the *haul*.

Q. And about how many people were present at this meeting?

A. Oh, I would say between 60 and 70. [305]

Q. Do you know whether employees from all of the operations in the Idaho Falls area were represented?

(Testimony of Raymond L. Hansen.)

A. Well, I know employees were represented from down as far as Firth, the Idaho Falls, Firth and Shelley areas. From,—as I recall it, I kind of checked the people with other of our members, the people that had become members previous to this meeting, and they looked over the people and knew them pretty well and we concluded that pretty near every house in this area here were represented.

Q. Can you name some of the operations that you know were represented?

A. Yes. The S. L. or L. S. Taube Company; the Idaho Falls Potato Growers Association, the Shelley and Idaho Falls plants, and Taube's from Idaho Falls, by the way. The Holden Brothers. O'Brien's. Howard. Hurly. Friedman. Bonded Warehouse.

Q. By Bonded Warehouse you mean Idaho Falls Warehouse?

A. Idaho Falls Warehouse Company, or,—and Stuart's. Christensen. And Holland and Ragon, or something like that, from Shelley. And W. P. Wilson from Firth.

Q. Did you mention J. E. O'Neil?

A. J. E. O'Neil from in out at Cotton.

Q. In addition to the employees who you list was present at this meeting, who else was there?

[306]

The Witness: Well I recognized,—well they introduced themselves as farmers

Trial Examiner Barton: All right. Proceed.

(Testimony of Raymond L. Hansen.)

The Witness: The chairman of the meeting introduced them as farmers, I don't recall the chairman's name.

Trial Examiner Barton: Do you recall the names of the gentlemen who were introduced as farmers?

The Witness: Well I merely said,—the chairman, he said that these five, or these four gentlemen and myself was picked [307] as a committee to discuss and talk to you boys.

Q. (Mr. Penfield) Do you recall the names of any of the four gentlemen?

A. Well I recall the names of two of the four; a Mr. Lew West, I think his name is Lew. However they call him Lew anyway and a Mr. Fred Gustafson.

Q. Were there any of the shippers or the shippers representatives present?

A. Yes. There were three or four buyers present from the various houses and one shipper in particular,—or manager, of one of the operations in particular that I recall was present.

Q. Who was that?

A. Mr. Farrel Hansen of the Idaho Falls Potato Growers. [308]

Q. (Mr. Penfield) Do you know Mr. Fred Gustafson?

A. Yes. I don't know him personally.

Q. Who is he?

A. I understand he is Secretary-Treasurer of the Idaho Falls Potato Growers.

(Testimony of Raymond L. Hansen.)

Mr. Weston: We are going to make the same objection, and that that answer be stricken.

The Witness: Well, he is, that is a known fact.

Trial Examiner Barton: Well if you know it to be true I will let the answer stand.

The Witness: He is the Secretary-Treasurer of the Idaho Falls Potato Growers, yes.

Trial Examiner Barton: All right.

Q. (Mr. Penfield) Now, will you describe for us what took place at this meeting of the,—the order in which it took place, as best you can recollect?

A. Well the meeting was opened by the chairman. He introduced himself; I don't recall his name. I can describe his personal appearance however. But it was called to order by the chairman of the meeting and he explained that they had been picked, he and these other four, had been picked to come and [309] talk to the employees of the various operations and to make them a proposition. The proposition, as he outlined it, was that they form a union of their own, you might call it an independent union, and that each that did that, if they did it, that the farmers would help them draw up their contract and would see that the dealers lived up to that contract. That unless the dealers lived up to the contract they would not sell potatoes to them. Then he went on to tell them that he didn't see why they should be throwing their money away and letting their money go out of the State when they could just as well keep that money at

(Testimony of Raymond L. Hansen.)

home. Well, he made an estimate of the amount of money that we were supposed to have taken in at that time, which was about five times what we had actually taken in. He then introduced Mr. West to the group and Mr. West, he was quite blunt in his remarks and accused,—

Trial Examiner Barton: Now just tell what he said.

A. (Continuing) Accused the union representatives of being racketeers and agitators and trouble makers and everything else.

Trial Examiner Barton: Well now let's get this straight. Did he use the words "racketeers and agitators"?

The Witness: Racketeers and agitators.

Trial Examiner Barton: Did he use the words "trouble makers"?

The Witness: Used the words "trouble makers" too. [310]

Trial Examiner Barton: Well just what did he say using those words?

The Witness: He said that they had always got along nicely in this community, very nicely, until this,—until as I recall, he said, "these God damned racketeers and agitators came in here" and further in his remarks he said that they had come in here and caused a lot of trouble, and all they were was just a bunch of trouble makers and he was referring all his remarks to me personally.

(Testimony of Raymond L. Hansen.)

Trial Examiner Barton: Well why do you say that?

The Witness: Well for me to say why he said it would be for me to give an opinion. The reason,—and in that opinion he said the,—

Mr. Penfield: Well just a moment. I think the Examiner asked you why he said,—why you said that; he wants to know why you say what Mr. West said was about you.

The Witness: Well they had mentioned my name several times and they had all mentioned.

Mr. Babcock: Did anyone else speak, Mr. Hansen? [311]

The Witness: All right. Mr. Gustafson got up and went over what he and Farrel Hansen had done and said that they had gone to Boise and had introduced a bill, a potato sorting bill and through their efforts this bill passed, making it possible for these people to be working and that unless conditions changed why he and Farrel Hansen would go back to Boise and have that bill stricken off the records, and all the potatoes would be sorted then on the farms, as they used to do.

Trial Examiner Barton: Well is that what Mr. Gustafson said at the meeting?

The Witness: No, that was the body of the bill or Act, the potato sorting Act as I understand it.

Q. (Mr. Penfield) What,—did Mr. Gustafson say anything further?

A. He then got mentioning my name, along with other union [312] representatives, as with other

(Testimony of Raymond L. Hansen.)

union racketeers, and he said that he would gladly spend twenty years of his life in jail to run a pitchfork through my God damn guts.

Q. Did Mr. Gustafson or anyone else speak further at this meeting?

A. Yes. There was a few,—there was two farmers that got on their feet. One happened to be the chairman of the meeting and he told of conditions that he had seen happen at Pocatello and I take it from his remarks that he must own property down there, in order to have these conditions,—in his connections with the Union down there.

Q. Just state what he told you?

Trial Examiner Barton: Who was this?

The Witness: He is the chairman of the meeting.

Trial Examiner Barton: You don't remember his name?

The Witness: No.

Trial Examiner Barton: All right. Tell what he said.

A. He said, he told of building a building in Pocatello and that on a Saturday afternoon he could finish the work on the plumbing, running it into the house, if his plumber would work on a Saturday afternoon, but they wouldn't and so he had to pay the city for a permit to keep the street open for a longer period of time, over Saturday afternoon and Sunday, and that the carpenters and the laborers and everybody else in Pocatello and, in the Pocatello area, had made a racket of labor unions

(Testimony of Raymond L. Hansen.)

[313] and he sure didn't want that same condition to come to Idaho Falls and another gentleman that was introduced as a farmer rose to his feet and made a few comments on the advisability of keeping the unions out of Idaho Falls. I don't recall his remarks exactly, but it was along the same lines as the chairman had talked. Then Farrel Hansen, manager of the Idaho Falls Potato Growers Association was introduced to the meeting.

Q. What did he say?

A. Well, he got up and started his remarks with,—that they had always got along very nicely here and that he loved every one of the boys working for him and that they had always been just one big happy family over at the Association, until a certain person with the same name as he had had come into this area and had started all this trouble. He made some remarks on visits that he had to Chicago and cited a particular instance where in a Chicago warehouse he had gone in and wished to examine some potatoes of his own and some of a competitor and he was going to take a sack off of the pile and dump it and the foreman stopped him and told him “no,” that he could not do that and he called over to one of the men and the foreman was supposed to have said to him, “come on over here and dump these potatoes,” and the man came over and lifted the sack down and dumped the potatoes and then he went through the spuds and then after he was through, why he said the common practice out here

(Testimony of Raymond L. Hansen.)

was they dumped them back in the sack and [314] he was going to thread them with his pencil, sew the sack up, and the foreman said "no," he said, "you can't do that," then he called over to another man to have him come over and tie up the sack, he sewed it up again. And then he told of another instance while he was waiting there of the business agent for the union driving down to the warehouse to check on the house and, I imagine that is what he said he came for, and when he drove down there he came in a very large car with a liveried chauffeur and drove up and got out of the car and went in and for a few minutes talked to the foreman and come back and got in the car and drove away, and he then spent about fifteen minutes I imagine waving a flag, just flag waving, and,—

Mr. Weston: (Interposing) I object to that as a conclusion.

Trial Examiner Barton: All right. It would be. The words he spent about fifteen minutes flag waving may be stricken.

A. (Continuing) Well, he spent about fifteen minutes, or better, and he cited his love for the big happy family of the Idaho Falls Potato Growers Association and at this time he finished his remarks and I got up and asked for five minutes on the floor, and I arose to my feet and asked the chairman inasmuch as I was the accused, if I could have about five minutes to defend myself and Lew West, at this point, rose to his feet and asked if this same courtesy would be extended to [315] these people

(Testimony of Raymond L. Hansen.)

if they wished to speak when they attended one of our meetings, if they would permit me to speak, and I said "yes," and I told them our meeting would be next day *and* 4 o'clock and they could attend, and I arose to my feet and explained to them the purpose of our meeting exactly as I had explained to our boys and the purpose of our organization and I told them if there was any questions or their mind I would be glad to answer them. I was asked a few questions and Willard Moore,—

Q. (Interposing) Who is Willard Moore?

A. He is an employee of the L. S. Taube Company,—rose to his feet and, in my defense on taking the money out of the country,—he explained he had been a member of the union on the Coast and he knew this condition did not exist and Milo Rash a member of the Idaho Falls Potato Growers Association, rose to his feet and said he had seen several promises of this sort made before and that he had never seen any of the promises carried through and then Adrian Allen, who was another employee of the Idaho Falls Growers employed at the Shelley plant, rose to his feet and directed his remarks to Mr. Hansen and asked Mr. Hansen if he was listening.

Q. You mean Farrel Hansen.

A. Yes. And he pointed his finger at him and said now I want you to listen to this and he got him to listen and he explained the promises that had been made in that plant and had [316] never been kept. Mr. Hansen and Mr. West asked me a

(Testimony of Raymond L. Hansen.)

few questions about the organization and this chairman of the meeting and I explained them to the best of my ability and at that time the meeting had been so upset by that time that it was impossible to continue further and there was no regular adjournment, it was abandoned.

Q. About how long did this meeting last before it was abandoned?

A. It lasted approximately two and a half *house*, as I recall it.

Q. I believe that you have already testified that the Union continued to hold organizational meetings?

A. We continued to hold organization meetings all right, up through the balance of that month, till the middle,—well the middle of February and a little past the middle of March.

Q. And were designations or applications signed at these meetings?

A. They were signed at all these meetings and about the,—let's see. On a meeting of February the 4th we,—we figured we had a fair majority in the different operations.

Q. When you say "we" who do you mean?

A. Well, the employees of the different operations, myself and Mr. Owens, we concluded that according to the information given us the impression that we had was we had a majority in several of the operations and we proceeded to elect a contract [317] committee representing, of the employ-

(Testimony of Raymond L. Hansen.)

ees of these various houses that we figured we had a majority in.

Trial Examiner Barton: That was on February 4th?

The Witness: That was on the meeting of February the 4th, yes.

A. (Continuing) On the meeting of February the 7th, on a Sunday, this Committee met with me. There was 10 as I recall. There was a few of the Committee could not be present, one or two from the different houses could not be present, and the ten members and myself proceeded to sit down and write a contract. This contract was presented to the members on Sunday February the 8th, and it was approved, with one or two minor changes. Mr. Owen took these contracts back to Pocatello with him and mailed them, the contracts, to the various members or I mean, the employers in this area.

Q. Mr. Hansen, during this period of organization which commenced about January the 16th, did any employees assist you in your organizational efforts?

A. Yes. There was quite a number. It seemed that the L. S. Taube Company was the most anxious to be organized and we obtained their majority *their* in two meetings and there was about,—well, what I call the original sixteen. There was sixteen of them that always sat right together at one side of the *haul* right up in the front seats right together and about half or better of these sixteen were very active. Carl,— [318]

(Testimony of Raymond L. Hansen.)

Q. (Interposing) Do you recall the names of some of these that were very active?

A. Carl Falk and Jack Hendrickson and Harold Goodell. Clancy Wadsworth, and, oh, six or seven others were very active. They helped me contact and distribute my pamphlets to the other houses and Milo Rash, from the Idaho Falls Potato Growers who was an employee there, he attended meetings with me at Firth,—or at Shelley and Rigby and assisted me here in getting authorization slips and was very active in the organization. And in assisting me in my work. [319]

Q. (Mr. Penfield) Mr. Hansen, you testified that contracts [324] were mailed to a number of employees of the potato growers,—workers?

A. No, let me correct that. I didn't testify that they had been mailed to the employees; that they had been mailed to the employers.

Q. Yes. I may have misunderstood or misstated myself. I am sorry. Now Mr. Hansen, following this did you attend a meeting with any representatives of these potato shippers?

A. Yes. On the second day of March I attended a meeting with Mr. Eli Weston, a Boise,—a Boise attorney, representing the dealers.

Q. Well who else was present at this meeting?

A. Milo Rash and Walt Graham and Mr. Lee Owen.

Q. And where was this meeting held?

A. This meeting was held in my room at the Rogers Hotel.

(Testimony of Raymond L. Hansen.)

Q. Who arranged this meeting?

A. The meeting was arranged between Mr. Weston and myself, either by communication or, either a communication either by phone or letter; I don't recall which.

Q. Can you tell us what occurred at this meeting?

A. Yes. Mr. Weston explained to us the very delicate situation that had,—that had come about in,—or had taken place at a York Grange meeting and he explained that he was invited to this meeting. We accused him of being the instigator of the thing but he denied that and we dropped that part of it. He [325] said that he had merely been invited over there to read the contract and to explain the contract to the Grange Masters,—or Grangers or whatever they call themselves. The members of the Grange. And that he had done this. We asked him about various things that were supposed to have been said there that we knew was false and he claimed,——

Q. What things did you ask him?

A. Well, for instance, it was claimed that we was asking for a guaranteed week and we was asking *for a guaranteed week and we was asking* they raise the amount to, as I recall, 87 cents, 87 per cent increase, for the employees and, oh, several small things in the contract had been falsified to the extent that it was worrying even our members and he disclaimed any credit for this. He said that

(Testimony of Raymond L. Hansen.)

the motion was made on the floor of the Grange meeting.

Q. What motion are you referring to?

A. A motion to boycott dealers signing a union contract, unless a representative of the Grange was present and he said the motion was made on the floor as I recall by a Mr. Taylor, living in this vicinity and that he didn't write the motion or have anything to do with the motion or the resolution. This resolution was passed unanimously by the group and he stressed again that he did not have, —that he was merely a visitor, that he happened to be in town and they had invited him over there to attend this meeting. We then discussed the seriousness of [326] the situation and it was mentioned by Mr. Lee Owen that he would like an opportunity to talk with the farmers in this community because he thought that they were mistaken and if afforded an opportunity he thought that he could explain it to their satisfaction. Mr. Weston, right at that moment, did not know whether that could be arranged or not and we made an appointment for the previous day.

Q. You mean the previous day Mr. Hansen?

A. Or, the following day. I beg your pardon. And at this meeting we further discussed the thing and a meeting was arranged with,—

Q. (Interposing) You are speaking, when you say this meeting you are speaking of the meeting held the following day?

A. The following day.

(Testimony of Raymond L. Hansen.)

Q. And where was that meeting?

A. That meeting was in my room at the Rogers Hotel.

Q. And who was present?

A. Mr. Weston, Mr. Farrel Hansen, Lee Owen, Milo Rash, Walt Graham and myself.

Q. And what occurred at this meeting?

A. Well we,—we went over this situation and Mr. Weston pointed out to us the seriousness of the situation. That it was a,—it had got completely out of hand and that they didn't know exactly what to do about it. That it had become so serious in his estimation that he thought that probably it would be a [327] good idea to hold a meeting with the farmers' grange and I wanted to know who would arrange the meeting. Well, after we discussed this part of it it was decided that Mr. Weston would arrange for the meeting, inasmuch as he knew the employers and in turn these employers knew the various farmers.

Q. When was this meeting to be arranged?

A. The meeting was to be the following Friday. It was to be arranged for Friday, the 6th, and on Thursday or Friday of that week, Mr. Weston called me and informed me that it could not be arranged until the 7th.

Q. Now, going back to the meeting of March the 3rd Mr. Hansen, I am not sure that I got you as to who was present; who was present at that meeting, the second meeting?

(Testimony of Raymond L. Hansen.)

A. The second meeting was held on March 3rd, Mr. Farrel Hansen,——

Trial Examiner Barton: I think he has already named those.

Mr. Penfield: I think he did too but I am not sure that he named one.

The Witness: Hansen, Rash, Owen, Mr. Weston,——

Trial Examiner Barton: He gave them.

Q. (Mr. Penfield) Did Mr. Farrel Hansen say anything at this meeting?

A. Yes. He blamed us for the disturbance,——

Trial Examiner Barton: Well now just tell what he said.

Q. Tell what he said. [328]

A. Well, let's see. The exact words I don't know. He said that we were, that you are to blame for this situation and he says if you can talk to these farmers why you might be able to explain it. And he wanted to know why we come to Idaho Falls and,—to do this organization work,—and we explained the reasons for it. That we had been petitioned by the employees and they had shown a desire for organization. And then we discussed world problems and we won the war and a lot of things. Then in, I think about, it lasted about two hours, but an actual discussion of the situation possibly about a half an hour of the time was used.

Q. At either the March 2 or the March 3 meeting did you discuss any of the terms of the agreements that had been presented?

(Testimony of Raymond L. Hansen.)

A. No. We didn't discuss any of the terms of the agreement. [329]

Q. Now this meeting, in regard to this meeting of March 7, did you attend?

A. Yes, I attended, with Lee Owens, Secretary-Treasurer of the local union and three *or* our members.

Q. You,—who were these members?

A. Milo Rash, Elmer Elg, and Willard Moore.

Q. Where was this meeting held?

A. This meeting was held in the Bonneville Hotel in a large banquet room over there.

Q. At that meeting,—what time did it commence? A. 8:30 in the evening.

Q. Who was the chairman?

A. Mr. Eli Weston was acting as chairman of the meeting.

Q. Mr. Hansen, can you tell us in substance what happened at this meeting and the approximate order in which it happened and try to confine your story to what evidence occurred and what was actually said by the persons involved?

A. Well, the meeting was opened by Mr. Weston and he explained to the group,—there happened to be a number of dealers [331] there and farmers and Grange Masters. He explained to the group the seriousness of the situation and that unless something could be arrived at or agreed to that the situation might become more serious. And that Mr. Owen, the local secretary and treasurer had wished

(Testimony of Raymond L. Hansen.)

to talk to the group in an effort to clear up some of the things that were said. He then,—

Q. (Interposing) Pardon me a moment, Mr. Hansen. I believe that before you proceed with this story it would be well for you to state the approximate number of persons who were there and who in general they were as you can best recollect?

A. Oh, I would say there was 60 or 70 people present. Of the Grange,—Grangers, the only ones that I was able to learn the names of was the State Grange Master, I think his name is E. T. Taylor, and a Senator Williams and a Luke Williams; Senator Elmer Williams, as I recall and a Luke Williams and a Mr. Taylor; I never did find out his first name, but he is a local farmer in this vicinity. And this other group, these people present that I either knew or knew by sight was J. E. O'Neil, Bert Stanger,—that is a pet name, I don't know what his initials are, it is Mr. Stanger that was on the witness stand the other day. Mr. Farrel Hansen and Mr. C. R. Holden. Mr. Lloyd Holden and Mr. E. S. Trask.

Q. Mr. Stuart there?

A. As I recall it he was. I didn't,—I never met Mr. Stuart personally until about a month or two after that. [332]

Q. That is the A. G. Stuart named in the complaint I am referring to? A. Of Shelley.

Q. Mr. W. P. Wilson?

A. No, I don't think he was present. I had

(Testimony of Raymond L. Hansen.)

met Mr. Wilson before that meeting and I don't recall him being there.

Q. Was Mr. Peters there?

A. I don't recall that. I never knew Mr. Peters until quite a while after that meeting. As a matter of fact a month or two after that.

Q. Well you don't know whether he was there or not?

A. I don't know whether he was there or not.

Q. Well, proceed, Mr. Hansen, with your account of the meeting?

A. Well, after Mr. Weston had made his opening remarks for the purpose of the meeting and he then introduced Mr. Lee Owen, Secretary-Treasurer of the local union, and explained to the group that Mr. Owen was from the Los Angeles area and had worked down there in the produce game and had had long experience in the produce game and that he had dealt with farmers and employers and those relations with the farmers and employers had always been of the best. Mr. Owen then took the floor and explained the purpose of organization and tried to clear up some of the falsified statements that had appeared in the local newspapers. He went through the contract and at differ- [333] ent times was interrupted with some question to further clear up the contract and explained to the best of his ability what the contract meant and what we were asking for. He explained that inasmuch as,—or, that presenting a contract to an employer did not necessarily mean that that

(Testimony of Raymond L. Hansen.)

same contract had to be signed. That we presented that contract to the employers and as provided by law, after a certain length of time we set down in negotiations.

Well, at the time of negotiations, why, we went through the contract and decided, what, on a contract, that we could both agree on, the employer and the union. He explained that the law required us to have 51 per cent majority in the company and that we had this.

He explained that it was impossible for the farm group to have a representative at our meetings, inasmuch as they did not have any employees in these houses or potato warehouses. That the farm,—we weren't attempting to organize farm labor or agricultural labor. That we were merely attempting to organize the people working for an employer in a potato warehouse or the people working out of the potato warehouse on farm crews.

He was then interrupted by Mr. Elmer Williams, and Mr. Williams, as I recall that, called him,—they called him Senator Williams and I took it for granted and learned later that he had been a Senator from the Blackfoot area in the [334] State legislature and he rose and asked where in the law there was a provision guaranteeing the unions a closed shop. We told him that was not in any law or Mr. Owen told him that and that it was not in any law, and it was merely an agreement between the employer and the union. Mr. Luke Williams,—it was a Mr. Williams,—I think

(Testimony of Raymond L. Hansen.)

his name was Luke, rose to his feet and told to the group that it was a very serious situation and that he did not think that,—that we should become,—the words he put it, that we should become involved, with any union. That in a certain period during a strike in Chicago, livestock yards, that the union activity there had cost the farmers of Idaho two hundred thousand dollars. That during the strike the price of lambs had dropped to the extent that between,—And I think he called it shrinkage,—that by the time the lambs were in cars waiting for the strike to be settled that the loss to the Idaho farmers was two hundred thousand dollars.

Mr. J. E. O'Neil rose to his feet then and asked Mr. Owen what in the Hell,—or what in the Hell have you ever done for your country; why in the Hell don't you get a gun on your back instead of causing trouble on others, words of that effect and Mr. Owens explained to him that he would be in the Navy in,—he had been in the last war and that in all probability, with his previous experience he would be in the Navy, in this war.

He then attacked me and Mr. Owens told him that during the last war that I was not old enough to have participated in the [335] war, but the way it looked he probably would this year,—or be in this war, and Mr. Farrel Hansen took the floor and he explained to the group that last year his,—referring to the previous season,—that his sorting costs had been eight cents a hundred and due to the lack

(Testimony of Raymond L. Hansen.)

of interest of the employees since union activity his sorting costs had gone up to 15 cents a hundred. He then said we have a Mr. Anderson here of the Quarter Masters Corps and he told me a story to-day that I would like him to tell you here tonight. He then introduced Mr. Anderson and I don't know his rank or what branch of the service he is with, other than what,—the introduction.

Mr. Anderson got on the floor and he told of an incident he had witnessed in the Los Angeles area, where an employer had a man that was, as he put it, a habitual drunkard, and he canned this man, and then he called the Union for another one, and the first one he called for was not the type of man he wanted, he could not do the work, he was not experienced, so he sent him back and called the union again for a man and the second man they sent out turned out to be the same as the first man and he called for a third and a fourth and finally in desperation the employer called the first man back again, rather, he said, I would rather have a drunkard on the job, as he put it, rather than a man he could not depend on. With those remarks Mr. Anderson sat down and Mr. Holden, C. R. Holden, took the floor and he told the group that he and his boys had always got along [336] swell. That he had provided for many of them even when they were not on his payroll, for hospitalization. He had lent them money several times and Mr. Owens put a question to him, he asked him if he had ever lost any money in this manner and he said

(Testimony of Raymond L. Hansen.)

no, he had not, that his boys were honest; and the meeting about that time became so confused and so,——

Mr. Weston: Just a minute. We would like to have the witness tell us what took place, just what took place.

Trial Examiner Barton: All right.

Mr. Penfield: Yes.

Trial Examiner Barton: Tell us what happened.

A. (Continuing) Well, several people was jumping up at the same time and there was disorder in the meeting and I rose to the floor and called for order. Mr. Weston called the meeting to order and we continued for possibly five minutes and Mr. Owens tried to explain a little farther on our activity and the meeting got out of order again and Mr. Weston called the meeting to order the second time and then introduced a Mr. E. T. Taylor, —I think his name is Mr. Taylor, a State Grange Master, and Mr. Taylor took the stand,—— [337]

Trial Examiner Barton: Tell what Mr. Taylor said.

A. Mr. Taylor took the stand and he said this was a clear demonstration of the fact that the farmers in this community had finally awakened to the seriousness of the situation at hand. He said that the Grange would stand behind the farmers in this state, or any other state, and in Washington, D. C. He accused the unions of trying to place a price ceiling on farm products in Washington. He told of a recent visit to Washington,

(Testimony of Raymond L. Hansen.)

D. C., where he had met with nothing but opposition from the unions. He then in his closing remarks made this statement, "the Grange is unalterably opposed to unions and will fight them to a limit;" that this was a clear demonstration of the fact that we were in two wars, one with an enemy of the country, and one,—that the farmers were in two wars, one with the enemy of the country and one with the unions. Then a Granger rose to his feet and made a motion the meeting adjourn and that the dealers and the grangers stay over for a few minutes for a meeting after the labor leaders had left. We then left the meeting and the dealers and the grangers stayed.

Q. (By Mr. Penfield): Following this meeting, do you recall a further meeting with representatives of the shippers?

A. Yes; on Wednesday, March 18th, we met with Mr. Weston [338] again, the representative of the shippers.

Q. Who met with him?

A. Mr. Lee Owen and myself.

Q. And where was this?

A. And Mr. Weston.

Q. Where did the meeting take place?

A. At my room in the Rogers Hotel.

Q. Who arranged the meeting?

A. The meeting was arranged either by telephone or letter between Mr. Weston and myself, as I recall it.

(Testimony of Raymond L. Hansen.)

Q. Tell us the best you can recall what occurred at this meeting?

A. Well, we discussed the problem. Mr. Weston made a few remarks on the grange meeting,—on the meeting held at the Bonneville Hotel, and we discussed,—at this meeting he discussed the possibility of negotiating the contract by mail, and Mr. Owen told him that wouldn't be feasible, because it would take a couple of years to negotiate the contract that way, and, as I recall, that was about the substance of the meeting, and we discussed a lot of World affairs,—we usually do.

Q. Do you recall any mention of the Union's majority?

A. I can't say that I do, other than this,—I don't recall whether it was at that meeting, or another previous meeting he had asked if we had a majority. We told him, [339] "yes," and at the time of negotiation we would submit proof of that majority. That is a common practice when we go into negotiation with the manager, before we start to negotiate we submit the proof of majority.

Q. Did you discuss any of the terms of the contract presented at this meeting? A. No.

Q. Was any arrangement made for a meeting in the future?

A. Well, we was supposed to have had a meeting at a later date, and I don't recall,—

Q. Was that date definitely fixed?

A. I don't recall,—it was supposed to be on a Friday, as I recall it. I don't remember whether

(Testimony of Raymond L. Hansen.)

it was Friday, the twentieth, or Friday, the twenty-seventh. My work was about finished and I got an assignment into the Salt Lake and Ogden area and I was supposed to get in there as fast as I could. I waited around until March thirty-first. As I recall, we either received a communication or some word that Mr. Weston was either sick or out of town, or something and couldn't make it.

Q. There was no meeting before you left?

A. There was no meeting. The last meeting I attended was on March 18th.

Q. Then you left the Idaho Falls area shortly after that?

A. I left the Idaho Falls area on the evening of March 31st. [340]

Q. Who was in charge of the organization of the potato workers after you left?

A. Lee Owen, secretary-treasurer of the organization.

Q. When did you,—or did you return to Idaho Falls?

A. Yes; I returned to Idaho Falls on the twenty-fourth day of September. I was called in, or assigned, or ordered to be present at a scheduled hearing of the Upper Snake River Valley Dairy-men's Association.

Q. And would you state the approximate time of that?

A. That was the twenty-fourth of September.

Q. Following that date did you have any further discussions with Mr. Weston or other representatives of the respondents?

(Testimony of Raymond L. Hansen.)

A. Well, I didn't see Mr. Weston on the twenty-fourth or twenty-fifth; I saw him in the lobby of the Rogers Hotel on the twenty-sixth and asked him when we were going to meet again. He said it would be in the very near future and he would let us know; and on the fifth of October was when I had the first meeting again with Mr. Weston.

Q. And how did that meeting occur?

A. Well, it was arranged between Mr. Weston and myself. I don't recall now whether it was by letter or by phone. I think Mr. Weston was in town staying at the Bonneville Hotel and that we arranged a meeting by phone.

Q. Where did you meet?

A. At my room in the Rogers Hotel. [341]

Q. What took place?

A. Well, we went over a general discussion of things, and at this meeting Mr. Weston asked if we were going to be able to prove our majority, and I told him I thought we would, and Mr. Owen assured him we would prove our majority, and he was then going to contact the dealers. He had attended a meeting of the Traffic Association that day, and he said that he was going to meet with a few of the dealers, as I recall, and see if we couldn't set down and get this thing done, but up to that time and that day we hadn't got anything done.

Q. When Mr. Weston raised the question of your majority did he state what payroll he sought to use? A. No; he didn't.

(Testimony of Raymond L. Hansen.)

Q. Did Mr. Owen?

A. Yes; as I recall, Mr. Owen said we would claim our majority on the day the contract was signed,—or the day it was presented.

Q. Then was a further meeting arranged?

A. Yes. But on October 6th I had occasion to call Mr. Holden,——

Q. What Mr. Holden is that?

A. Mr. C. R. Holden, and we talked over the possibility of getting a few of the dealers together, and Mr. Holden arranged to have a few of the dealers come up for just a [342] general discussion on the contract. We thought possibly,—my thought in the thing was that if we could possibly get a few of the people involved together that we might be able to get the job done. On the seventh, on a Wednesday, October 7th, we met in my room in the Rogers Hotel.

Q. Who was present at that meeting?

A. Mr. C. R. Holden, Lloyd Holden, Farel Hansen, W. P. Wilson, Bert Stanger, Lee Owen and myself, and Mr. Carl DeLong.

Q. What took place at that meeting?

A. Well, we discussed a problem of the dealers. The dealers in the area had started a wage war and it was becoming serious and they were unable to control it, and we discussed methods of controlling that. We outlined our ways of controlling labor piracy on defense jobs and that it had worked out and was very satisfactory. We then went into various phases of the contract, such as show-up

(Testimony of Raymond L. Hansen.)

time, and we discussed that, and the wages, and the several phases of the contract. We then agreed that we would call a meeting of our membership and put the proposition up to them and report back at a meeting at a later time.

Q. What proposition were you to put up to your membership?

A. The proposition of a stipulated wage that they had agreed to among themselves to pay, and they wanted us to put that before our membership, and other things they had proposed. [343] We called the meeting of the membership for the following Friday night, as I recall it. That would be October ninth, and we put the proposition to the membership. We was then to report to,—

Q. Did the membership take any action, or take any vote?

A. Well, they took a vote on it and they couldn't agree on the wages, inasmuch as the wages in the Shelley area were ranging from ten cents to about twenty or twenty-five cents higher than they were in this area, as a result of this wage war. Then on October 12th,—

A. On October twelfth we met with Mr. Weston, and we talked over a plan of attending a traffic association meeting on the following Monday, and in this meeting it was suggested that we put our proposition up to the Traffic Association, and the ones who wanted to go with us could go with us and the ones that didn't want to go with us wouldn't go with us, and the ones who wanted to go with

(Testimony of Raymond L. Hansen.)

us we would set down and negotiate the contract with them, and that was about all,—that was about the substance of the meeting of the twelfth, October twelfth, as I recall it.

Q. On what date was this later meeting to be held? [344]

A. The meeting was scheduled for October nineteenth.

Q. And was this meeting held?

A. No; on the Saturday following that I received a wire from Mr. Weston explaining that Mr. DeLong was in the hospital. Mr. C. R. Holden and Mr. Farrel Hansen had gone to Washington on the price ceiling; and Mr. Chris Christensen was unable to attend.

Q. Was a later date set for the meeting?

A. No; I didn't see Mr. Weston again then until October twenty-third. I heard that you, Mr. Penfield, had arrived in town and I went up to your room to see you, and Mr. Weston happened to be there, and at that time he told me that he was going to recommend to the dealers that they go through with the hearing and that he didn't see any use of any further negotiations.

Q. Was that the last meeting you had with Mr. Weston?

A. That is the last meeting I had with Mr. Weston; yes. [345]

Cross Examination

Q. Now, let's go back, if you don't mind, to the meeting in January in the city hall.

(Testimony of Raymond L. Hansen.)

A. The twenty-fourth of January.

Q. That meeting, I believe you testified, was called by the farmers?

A. There was a farmer chairman. It was a farmer chairman.

Q. He introduced some farmers?

A. As I recall, the chairman said a group of farmers had attended a meeting with the dealers and had asked them,—or an agreement was reached between the farmers and the dealers to call this meeting, and they had contacted the dealers and asked for a representative group of each dealer to be present at this meeting.

Q. So the farmers asked the dealers to send some of their [348] employees to this meeting?

A. That is right.

Q. And for the dealers themselves to be present?

A. No; I don't think they invited the dealers themselves. There was only one dealer present.

Q. I see. Just one dealer, and he was of the Farmer's Co-op?

A. He was from the Idaho Falls Potato Co-op.

Q. That is Mr. Hansen?

A. That was Mr. Hansen.

Q. I believe you testified that at this meeting these farmers mentioned that they would not send their produce, or their potatoes, into these dealers if they had to be mixed up with the union, or words to that effect?

A. No; they suggested an independent union.

(Testimony of Raymond L. Hansen.)

Q. To refresh your memory, didn't you testify Mr. West made the statement the farmers were going to boycott?

A. No; they didn't say anything about that at all at this meeting. They said the farmers were opposed to labor racketeers and agitators, and that if they got their own independent union that the dealers would back them up, and if the dealers didn't deal with this independent union, the farmers wouldn't deal with them. In other words, that is a boycott on the dealers unless they would deal with the independent union. [349]

Q. Didn't you also state if they didn't do that they might boycott these dealers?

A. No. Then I referred to Mr. Gustafson's remarks where he said if they didn't do that, as you put it, Mr. Farrel Hansen and he was going back to Boise and take the sorting law off the books again.

Q. I recall that. But, at least, these farmers at this meeting impressed you with the fact that they were going to attempt to control the situation by telling both you and the dealers what to do, didn't they?

A. Do you want my impression of the farmers?

Q. Well, maybe the question is confusing. I have written down here that you said, "The farmers said at this meeting they would not sell potatoes to the dealers if they dealt with the union."

A. No; they would not sell potatoes if the dealers,—if they didn't deal with this,—that if they

(Testimony of Raymond L. Hansen.)

formed this independent union and the dealers wouldn't deal with this independent union, they wouldn't sell potatoes to the dealers.

Q. In other words, these farmers wanted the dealers to make an independent union, didn't they?

A. They wanted an independent union, one they could control.

Q. That is right. [350]

A. They wanted to write the contract for the boys, or wanted to sit in and help write it.

Q. The farmers wanted that?

A. Yes, sir. [351]

Q. Now, this takes us up to March third, and I believe you have testified that along about that time I suggested that we might have to do some of this negotiating by mail, didn't I?

A. No, as I recall it, you suggested that on the meeting we had with you on March 18th.

Q. And you turned it down? [360]

A. We turned it down, for this reason: It is impossible to negotiate by mail.

Q. That is a matter of opinion.

A. Well, we have had a lot of experience, and that is our opinion.

Q. At least you didn't want to try that method?

A. We have tried it thousands of times.

Q. You didn't want to try it in this case, and you turned it down?

A. We turned it down.

Q. All right. Now, we were at this time having some other meetings, besides the ones you mentioned, on the creamery matters, weren't we?

(Testimony of Raymond L. Hansen.)

A. No; the creamery meetings were taken up at the same time as these; they were intermingled.

Q. Well, did Mr. Owen ever tell you about a meeting with the Creamery's board of directors and the labor committee, and with Mr. Ballou and Mr. Mays?

A. Well, now, those meetings I didn't attend. I am talking about the meetings I attended.

Q. You knew there were other meetings?

A. Oh, yes, I knew there were other meetings, as I recall, through the summer.

Q. That is right. Now then, in April, do you recall I told both you and Mr. Owen I had to go back to Washington, [361] D. C. for two or three weeks?

A. That must have been the reason we didn't have the other meeting that was scheduled in March.

Q. That is right.

A. But I didn't know,—I didn't know whether you were ill, or had to leave town or what the reason was?

Q. You received a telegram from my secretary from Boise on one occasion, did you not?

A. There was some sort of a communication, yes; and I waited there until the thirty-first of March.

Q. Let me ask you this general question, Ray, so we will understand each other: Have I ever refused to meet with you and discuss these problems?

(Testimony of Raymond L. Hansen.)

A. Well, I never knew of your refusing, but I never knew of your setting down and negotiating a contract, or attempting to.

Q. That is a matter of opinion. But I never refused to meet with you, have I?

A. Never refused to meet with me. [362]

Q. All right. The October 7th meeting, I would like to refer to that for a moment. That was quite a long meeting, wasn't it; that is, we got down to business and discussed the contract at quite some length?

A. Yes, we did. There wasn't any of the usual opening remarks about the World War and everything like that.

Q. We left the world problems to themselves at that meeting, didn't we?

A. Yes, we didn't go into those that night.

Q. Now, isn't it a fact that you discussed this meeting with Cy Holden, or C. R. Holden prior to that?

A. Yes, yes.

Q. And he said he thought it would be a good idea to try to get some of the boys together for a meeting, that is right?

A. That is right. I testified to that I think.

[372]

Q. That's right. Now, at this meeting we went into numerous problems of the industry, such as pirating of help and wages and so on?

A. That's right.

Q. And then we went into the contract, didn't we, thoroughly?

(Testimony of Raymond L. Hansen.)

A. We went into phases of the contract quite thoroughly.

Q. We actually left the meeting in accord as to what we thought were the prospects of getting the contract ironed out?

A. Now when you say "we" what do you mean?

Q. Everybody.

A. I can't give an opinion on your thoughts, but that was the opinion I had.

Q. And did I show any objection that night; wasn't I a pretty nice fellow?

A. Well, as I understand, you hadn't been invited to the meeting, and you met some of them down in the lobby and came up with them.

Q. And for that reason I said very little?

A. And you said very little.

Q. And so everybody was in pretty good accord as to what we would do?

A. Yes, arrangements for further meetings were made and we had agreed to put the proposition to the boys.

Q. Now, Lee Owens can't quite remember about this two-paragraph contract. Can you remember whether I said,—or he said [373] that is all I want, is a little two-paragraph contract on the relations between the dealers and the employees. Now let's be frank on that, isn't it a fact that he went a little bit too far that night in saying that about this contract?

A. Now just a minute. Let me get this in my head. I remember these instances, but I got to get

(Testimony of Raymond L. Hansen.)

them in my head. As I remember I said,—or he said, all we need,—all we require with the contract is a contract with the proper language placed in the contract and if a short one had it in it would be all right to have a short contract.

Trial Examiner Barton: But did he say two-paragraph?

A. (Continuing): I think he said a two-paragraph contract if the language was right.

Q. Do you recall him holding up his hand like this (indicating) and saying just two little short paragraphs?

A. Well, you can say an awful lot in two paragraphs.

Q. That's right. And seriously didn't I come into the discussion and say that I could draw a two-paragraph contract or draw it just as short as he wanted it?

A. Yes, well,—

Q. (Interposing): That I was willing to do that, I volunteered to do that, isn't that right?

A. I think you volunteered to draw the contract up.

Q. And you were going to call a meeting of your employees weren't you?

A. We,— [374]

Q. (Interposing): And that was to be two nights later and we were to discuss these things to get their reaction?

A. That's right.

Q. And then we went into the discussion of the taking of the employees to and from their work?

A. That's right.

Q. And we went into wages?

(Testimony of Raymond L. Hansen.)

A. We went into wages that had been agreed by the dealers themselves, without any agreement with the union.

Q. Yes. And I think we discussed the working day too, and the working week too a little, didn't we, that night?

A. On that,—let's see. On that particular night I think that,—that we went into a contract that had been agreed by another operator, an agreed contract that we was holding in abeyance, pending negotiations with these other operators.

Q. That was the Atlantic Commission Company?

A. That was the Atlantic Commission Company.

Q. And we discussed their contract a little and you told us what they had orally,—that they had orally agreed to pay a certain wage?

A. That's right.

Q. And we discussed women workers a little, too, that night, didn't we?

A. I think we did discuss women working.

Q. I think I asked you if they were eligible to join the [375] union, or words to that effect?

A. Yes.

Q. No it would be fair to say that this was a very good meeting and very constructive meeting, is that right?

A. Yes, I think it would be fair to say that.

Q. Would it be your conception of bargaining under the terms of the Wagner Act,—at least one step in bargaining?

(Testimony of Raymond L. Hansen.)

A. Well now in order to answer that I have got to relate my,—why I thought it would be a good idea to call these dealers together; because we wasn't getting any place with their representatives.

Q. That's right.

A. (Continuing) And said all we would do is get up there and discuss world problems and things that didn't pertain to the contract at all.

Q. May I interrupt and ask you if you didn't discuss these world problems about as much as anybody else?

A. That's right. We discussed world problems with you and Mr. Owen and myself.

Q. All right, go ahead.

A. (Continuing) And it was my opinion if we could get the people involved together, or representatives of those people, that we could probably do a lot better than we could with their representative.

Q. Meaning me? A. Meaning you. [376]

Q. That was your idea, getting this meeting together? A. That was my idea.

Q. And you did get quite a ways at that meeting though? A. That's right.

Q. You did, or we did get,—just had a really a good meeting?

A. Yes, we got quite a ways.

Q. And really,—I will withdraw that. Now, after this meeting we were to have another meeting with the shippers you testified but due to the absence from the city of several who would normally

(Testimony of Raymond L. Hansen.)

attend this meeting, we called this meeting off or I called it off? A. That's right.

Q. I wired you to that effect?

A. Well, we had, as I recall it, we had a meeting on the 12th,—of October,—a Monday.

Q. Well just answer my question. That meeting we were going to have was called off, isn't that a fact; I don't want to stop your answers but just to shorten this up a little, that is all I want you to answer.

A. Well, the meeting we was figuring to have, this meeting with this Traffic Association on the 12th, it was decided they was not going to have any meeting and that was called off.

Q. This meeting I was talking about, we discussed this contract, was October 5th? [377]

A. No, that was the 7th.

Q. October 7th? A. Wednesday night.

Q. Did you know that Mr. Owens signed an affidavit, supporting a charge against these Respondents on October 7th, that same day?

A. Did he file,—he signed a charge?

Q. Did you know about that?

A. The charges were made way last spring.

Q. Well then you don't know that he signed one on October 7th; whether he did or did not you don't know?

A. I don't know whether he did or not.

Q. That is a matter of record. So that if he did sign one and make an affidavit on that day you don't know anything about that at all?

(Testimony of Raymond L. Hansen.)

A. No. I don't know anything about it.

Q. Now, after this meeting, that is, we were to have another meeting on the 19th, weren't we, or you were to meet with the shippers on the 19th?

A. Yes.

Q. And that meeting was called off?

A. Yes.

Q. Now, shortly thereafter, in fact, in the next day or two, this complaint was served?

A. Of the meeting of the 19th? [378]

Q. Just shortly after the 19th, this complaint and motion was filed and served, wasn't it?

A. No, it I think was shortly before the 19th.

Trial Examiner Barton: Well the record will show when it was filed.

The Witness: As I recall,—

Trial Examiner Barton: (Interposing) Well you don't need to answer the question; the record will show the date.

Q. The point I wanted to make, about this same time this action was started as this meeting?

A. That's right.

Q. About this time. Then, shortly after the 19th you had another talk with Mr. C. R. Holden, didn't you, about negotiations, and so forth?

A. Yes, I had a talk with him on the phone.

Q. And do you recall that he told you at that time that he didn't think,—strike that out.

He told you at that time that there could not be any further negotiations until after the hearing or words to that effect?

A. No.

(Testimony of Raymond L. Hansen.)

Q. Tell us just what he told you?

A. As I remember, he told me that some of the boys was pretty sore, because on the day of our meeting up in my room or the,—that the charges had been filed against some of the boys after [379] the,—the day of the meeting up in my room, and that some of the boys were pretty sore about it. I don't think he mentioned anything about further negotiations.

Q. Well didn't you ask him about further negotiations, if you couldn't get to them or something to that effect?

A. That was the purpose of my call, but when he told me that I don't recall whether I asked him or not.

Q. Well you wouldn't say he didn't say that?

A. I wouldn't say he didn't say it. [380]

Redirect Examination

Q. (Mr. Penfield) Mr. Hansen, during the period of your organizational drive, were you informed that certain employees at Taube had been laid off?

A. Yes.

Q. About when were they laid off?

A. The day they were laid off.

Q. Do you know about when that was?

A. As I remember it was some time the first of February, first part of February.

Q. Did you take any action with respect to the layoffs?

A. Yes. I visited Mr. Holden over at the Taube company and talked to him about it. He told me

(Testimony of Raymond L. Hansen.)

that they had not been picked for union activity. That they had gone through the list and picked the men that they figured was less capable than other men, and I pointed out to him the fact that was darn funny he picked those men when some of them had worked there for years and had always been capable men and that the foreman had told them they were capable and he says: well, that the way we picked them and that was that. [382]

Mr. Weston: Can you tell me the date of that meeting?

The Witness: With Mr. Holden?

Mr. Weston: Yes.

The Witness: Well, he can check his record and find when he canned these men, it was the day after.

Mr. Babcock: I think the date of the discharge is admitted by the pleadings, February 5th.

Trial Examiner Barton: The day after their employment was terminated or they were fired or laid off, is that right?

Q. Mr. Hansen, with respect to this meeting of October the,—I believe it is October the 7th, how many of the dealers did you state were present at this meeting?

A. There was C. R. Holden; Mr. Lloyd Holden; Mr. Bert Stanger; Mr. W. P. Wilson; Mr. Hansen was supposed to have been there but for some reason he couldn't make it, he was on the committee I understand and Mr. Carl DeLong and Mr. Weston.

Q. Now, you testified that you discussed a num-

(Testimony of Raymond L. Hansen.)

ber of matters in connection with the contract. Did any of these dealers ever agree upon these provisions unless the other dealers could also be brought into line? [383]

A. Well, we never agreed on any contract or any of the provisions. We discussed some of the provisions of the contract, but we didn't agree on any.

Q. Well what was said with respect to the other dealers who were not present?

A. Well, at this later meeting the only thing that was said in connection with other dealers was that they were going to take it up with the other dealers and report to them and at [384] another date, when we would meet with the Traffic Association that the dealers that wanted to go with us could and those that didn't want to go with us we would just exclude them.

Q. Now, this meeting scheduled for the 19th. Was that agreed upon at this October 7th meeting?

A. No, that meeting we was to get the,—to meet with them at a later date, but the date was set on October 12th, when Mr. Weston met with myself and Mr. Owens and Mr. Al May, our International representative.

Q. Was it at this October 12th meeting you agreed upon a further meeting?

A. Yes, it was.

Q. And with whom were you to meet on this latter date?

A. Well, with the members of the Traffic Asso-

(Testimony of Raymond L. Hansen.)

ciation. They have a luncheon on Mondays and we was to meet with them after this luncheon.

Q. Did that include shippers involved in this complaint?

A. Well, I can't say as to that. [385]

Redirect Examination

Q. (Mr. Penfield) Mr. Hansen, I believe on cross-examination you testified that on the 7th of October meeting Mr. Weston had stated that he would draw up a two-paragraph agreement and submit it to you, is that correct?

A. Yes, he was the one that brought that up.

Q. Was any such agreement ever submitted to you? [387]

A. No. [388]

R. I. JONES,

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Barton: State your full name, please.

A. R. I. Jones.

Q. (By Mr. Penfield) Where do you reside, Mr. Jones?

A. At Rigby.

Q. And how far is Rigby from Idaho Falls?

A. Fourteen miles.

Q. What is your occupation, Mr. Jones?

A. Editor of the Rigby Star.

(Testimony of R. I. Jones.)

Q. And how long have you been editor of the Rigby Star? A. About twenty-five years.

Q. Can you state,——

Mr. Penfield: Strike that, Mr. Reporter.

Q. Can you tell us what your duties as editor of the Rigby Star include?

A. Well, yes, editing and reporting in general.

Q. Is that local reporting?

A. Yes, sir.

Q. What sort of events do you report?

A. Most all kinds.

Q. In what area? [408]

A. Well, in the local area around Rigby.

Q. How often is your paper published?

A. Once a week.

Q. And in what area does it circulate?

A. Well, in Jefferson County, mainly.

Trial Examiner Barton: Is Jefferson County adjacent to Bonneville County?

A. Yes, sir.

Mr. Penfield: I ask that this paper be marked as Board's Exhibit No. 52, for identification.

(Thereupon, the document hereinabove referred to, was marked as Board's Exhibit 52, for identification.)

Q. I show you Board's Exhibit 52 for identification, and ask you if you can tell me what that is.

A. That is an edition of March 5th, 1942, of the Rigby Star, a copy of it.

Q. I call your attention to an article in the lefthand corner and ask you if you can state

(Testimony of R. I. Jones.)

whether or not,—or if you can tell me who prepared that, or wrote that article?

A. I wrote the article.

Q. What does the article purport to be?

Mr. Weston: We object to that until the exhibit is introduced in evidence.

Mr. Penfield: Well, I was merely further trying to,—I will offer it in evidence, Mr. Weston. [409]

Mr. Weston: I haven't seen it yet.

(Mr. Penfield hands proposed Exhibit 52 to Mr. Weston.)

Mr. Weston: Before I make any further objection I would like to ask the witness a question for the purpose of laying a foundation.

Trial Examiner Barton: All right.

Q. (By Mr. Weston) Mr. Jones, did you contact someone to get the information for this article?

A. No, sir. I reported,—that is a report of the meeting.

Q. Were you at the meeting?

A. Yes; I was at the meeting.

Q. That is your report of the meeting?

A. That is my report,—news report.

Mr. Weston: We have no objection as to the authenticity of the article, but we object to its introduction on the ground it is not binding on these respondents, and it is immaterial and improper for that reason.

Trial Examiner Barton: May I see the article?

Mr. Penfield: Yes. (Hands to Examiner.)

(Testimony of R. I. Jones.)

Trial Examiner Barton: Did the events you mention in this article take place at the meeting referred to?

A. Yes, sir.

Trial Examiner Barton: The objection is overruled. The article may be admitted in evidence.

(Whereupon, the document heretofore marked of Board's Exhibit 52 [410] for identification, was received in evidence.)

Q. (By Mr. Penfield:) Mr. Jones, you have already stated that you attended the meeting which this article reports? A. Yes, sir.

Q. Did you take notes at that meeting?

A. Yes, sir.

Q. Was this article prepared from the notes you took? A. Yes, sir.

Q. Does this article set forth what occurred at that meeting?

A. So far as I could interpret them, yes.

Q. I call your attention to some statements reportedly made by Mr. Farrel Hansen. Does this article set forth the statements as you heard them at that meeting?

A. As I understood them. [411]

FARREL L. HANSEN,

recalled as a witness by and on behalf of the Board, having been previously sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Barton: Are you the same Mr. F. L. Hansen who was on the stand before in this hearing?

A. Yes, sir.

Q. (By Mr. Babcock:) Mr. Hansen, have you attended the Monday luncheon meetings of the Idaho Traffic Association during the past year?

A. Quite regularly; yes.

Q. You say "not," or "quite?"

A. Quite.

Q. Quite. Did you attend them during the months of January, February and March?

A. Well, I wouldn't want to say I attended all of them. I am sure I attended some.

Q. What is your best recollection as to the frequency with which you attended the meetings?

A. Well, I think I attended the majority of them, over half of them. [414]

Q. When was the question of a labor union among the employees in the potato warehouses first discussed in one of those Monday meetings?

A. That I cannot recall.

Q. Can you recall approximately?

A. Well, I don't know that I could, Mr. Babcock. The dates I don't have in mind at all with regard to it.

(Testimony of Farrel L. Hansen.)

Q. Do you remember the occasion of receiving a proposed contract and a letter from the union?

A. Yes.

Q. In February?

A. Well, I think it was in February. I can look that up. I think we have a record of that.

Q. I think the record already shows that date. Was it before or after that date you first discussed the matter of the labor union in your Traffic Association meetings on Monday?

A. Oh, I don't know that I would recall definitely, to be perfectly frank with you on it. I don't recall just when any discussion came up about labor, or wages, or contracts.

Q. You recall that the subject was discussed?

A. Yes.

Q. At one meeting, or more than one meeting?

A. Well, I think it was discussed at several times,—several [415] occasions.

Q. During the months of January, February and March and April when this matter was particularly prominent it was discussed at virtually every meeting, was it not?

A. It would be my opinion that it was, in most cases.

Q. And what was the nature of that discussion?

A. Oh, more or less informal, just round table comment, back and forth.

Q. Were agreements expressed,—I mean, were opinions expressed by the various persons there with respect to the contract which had been asked?

(Testimony of Farrel L. Hansen.)

A. Well, I don't think as a whole; no. Various parts of it were analyzed and commented upon.

Q. Was that also true with respect to the fact that the labor,—the union was attempting to organize these workers?

A. I didn't understand the question.

Q. I will re-state it: Were opinions also expressed by the members present of the fact that the union was trying to organize these workers at that time?

A. I wouldn't say opinions were expressed. I would say the information was passed one to the other, or from one to the other.

Q. Now, at these meetings, according to the stipulation which is in the record, from time to time agreements, or decisions were reached by the persons present on various [416] subjects,—is that correct?

A. No, I wouldn't say that was. That is not according to my understanding of what did take place at these meetings. They were not formal in their procedure.

Q. I understand that. But there were occasions on which members present did express substantial agreement on various subjects?

A. Not that I can recall, Mr. Babcock.

Q. You don't recall that? There were several decisions reached at these meetings with respect to certain matters in connection with the labor contracts, isn't that true?

(Testimony of Farrel L. Hansen.)

A. Not to my knowledge; not any decision I know of and can recall that was reached at those meetings with regard to the contract.

Q. I am talking about the decisions from the persons present discussing it. A. Yes, sir.

Q. Mr. Hansen, reference was made here to a meeting in the city hall on January twenty-fourth. I will ask you to state whether you attended a meeting of farmers and shippers prior to that meeting which was held at the Bonneville Hotel?

A. Well now, so far as the dates are concerned, I am not in position to say that I attended a meeting on a specified date, because I frankly don't recall dates. [417]

Trial Examiner Barton: Let's forget about the dates. Now, do you remember the city hall meeting?

A. Yes; you bet you.

Trial Examiner Barton: Did you attend the Bonneville Hotel meeting before that?

A. Yes, sir.

Q. (By Mr. Babcock:) How long before was it?

A. I believe it was the day before, or the evening before. As I recall it, the Bonneville Hotel meeting was on Friday evening, and the meeting at the city hall was on Saturday afternoon, the next day.

Q. I believe that is correct.

Q. How many persons were present at the meeting at the Bonneville Hotel?

(Testimony of Farrel L. Hansen.)

A. I would say between fifty and seventy-five.

Q. And, generally speaking, who were they, that is, what occupations did they have?

A. Oh, the big majority of them were farmers.

Q. And what about the additional persons?

A. Well, as I recall it now, there were five or six shippers there.

Q. Will you name those, please?

A. Those that I can recall being there were Mr. Stanger, Bert Stanger; Mr. C. R. Holden; Mr. Lloyd Holden, and Mr. O'Neil. [418]

Q. Do you recall whether Mr. DeLong was there? A. I believe he was.

Q. What was the nature of this meeting? Was it a dinner meeting, or a formal meeting, or what was it?

A. No; it was an informal meeting. It was called in the evening. There was no meal in connection with it.

Q. Who presided at it, if you recall?

A. I believe Mr. George Hersley was selected by the group to act as chairman.

Q. You are quite certain about that?

A. As I recall, I believe that is what occurred.

Q. Now,—

Trial Examiner Barton: Will you tell us who he is, Mr. Hansen?

A. He is a farmer who lives about six or seven miles south of Idaho Falls.

Q. (By Mr. Babcock:) Would it refresh your

(Testimony of Farrel L. Hansen.)

recollection if I tell you that Mr. DeLong acted as chairman at the meeting?

A. That is not according to my recollection. It seems to me he may have acted as temporary chairman in calling it to order, but I am almost positive they asked George Hersley to act as chairman for the body of the meeting.

Q. Who invited you to the meeting?

A. I can't recall that. I can't recall who in detail [419] asked me to attend. I was informed by someone there was a meeting there and they would like to have me come.

Q. Do you recall how you were informed? Was it by personal conversation, or——

A. I believe there was one or two of my directors told me there was a meeting to be held and they wanted me to come over.

Q. Were there some of your directors there in addition to yourself?

A. I am not a director.

Q. I understand, but were there some of the directors there?

A. Yes, Mr. Trask was there. I believe he is the only one,—I am not right positive whether Mr. Poitevin was there or not. I don't recall his being there.

Q. Was Mr. Gustafson there?

A. Yes; that is right.

Q. In fact he was on the committee that was selected that night to meet at the city hall?

A. That is correct.

(Testimony of Farrel L. Hansen.)

Q. When you were asked to attend, were you told what the purpose of the meeting was to be?

A. I don't recall that I was, in detail. However, I was generally acquainted with the fact that this discussion with regard to organizing the potato workers was quite an active topic, and I understood before I went there the pur- [420] pose of the meeting was to discuss that.

Q. And when the meeting opened, was the purpose explained by anyone?

A. I don't recall that it was, specifically. It started rather informally.

Q. As it developed, did you find out what the purpose was?

A. Oh, yes; yes. In fact what they wanted to know,—what the farmers wanted to know from the shippers, the dealers what the essence of the difficulty was with regard to the labor.

Q. How many people talked that night?

A. Well, there was, I would say, ten or fifteen out of the body took part in the discussion actively.

Q. The difficulty which you referred to, I take it by that, I understand you to mean the organization, or the attempted organization of the workers by the union?

A. That was only a small part of it, as I recall the discussions engaged in at the meeting. The farmers seemed to be concerned over the fact there was to be an increased demand in wages made by the workers, and they felt they were entitled to a

(Testimony of Farrel L. Hansen.)

part in that discussion, because it was coming out of their pockets if the raise was granted.

Q. There had been no contract presented up to this time, had there?

A. Not to my knowledge. [421]

Q. Are you able to give us in detail now what was said by each person who spoke at the meeting?

A. No; not in detail. I could give a general report.

Q. Do that, if you will, what was said by various persons, in substance?

A. As to recalling the exact person who made the comment, I wouldn't be qualified to do that, because I don't remember it enough in detail. The big complaint on the part of the farmers was that if an increase in wages was going to be demanded they felt they should be consulted on it and be a party to it, for the reason that any raise in pay to the workers was going to have to come out of the farmer's pocket. They wanted to know what the difficulty was among the shippers. Several of them asked some of the shippers, "What is the trouble? What is the complaint on the part of the boys?" And as I recall it, there was no shipper there that could, or would, specify anything that he thought was out of line or out of order so far as wages or working conditions were concerned. After that had been gone over pro and con for a little while, it was decided, I think by motion, as I recall it, that a committee of growers be selected

(Testimony of Farrel L. Hansen.)

from that meeting by the chairman to call upon each of the potato warehouses in Idaho Falls and Shelley asking the employees from those warehouses to send representatives to a meeting to be called the next day, [422] at which time they were to meet with this committee of farmers, to ask the workers what was wrong if there was something wrong, and if it couldn't be settled between the farmers and the dealers and the laborers in a peaceful way without a lot of difficulty, hard feelings, and so forth, that might otherwise occur.

Q. And without the intervention of an outside union? Isn't that correct?

A. That was implied, I think; yes. I think it is fair to say that was implied.

Q. Was a committee selected?

A. Yes, sir.

Q. Can you give us the names of the members?

A. I think I can. George Hersley; Lou West; Lem Cook; Emil Johnson and Fred Gustafson.

Q. Who was chairman of the committee selected by the committee, do you know?

A. The chairman of the committee was George Hersley.

Q. Who is Emil Johnson?

A. He is a farmer out here in the New Sweden section; also county commissioner.

Q. Does he hold any position in the Grange?

A. He has been a master of the New Sweden Grange; yes.

(Testimony of Farrel L. Hansen.)

Q. And the next one you mentioned was Lem Cook?

A. Yes, sir. [423]

Q. And who is he, and what is his occupation?

A. He is a farmer, potato grower.

Q. Is he connected with the Grange, or has he been?

A. He is a member of the Grange.

Q. Do you know whether he holds any office?

A. He is a member of the executive committee of the New Sweden Grange.

Q. Is Mr. West an officer of the Grange?

A. No, sir.

Q. And hasn't been?

A. No.

Q. Do you know whether any of these individuals selected on the committee are engaged in any business other than farming?

A. None of them are. I don't know what the extent of their investments might be, but their principal work is farming, very definitely. They each one live on a farm, and that is their main source of livelihood.

Q. What arrangements were made in connection with the meeting to be held in the city hall to get the representatives from the employees to the meeting, notifying them?

A. I can't tell you that for sure. I can tell you what the consensus of opinion was the night of the meeting, and that was that each member of this committee,—they were to divide the warehouses up, and go themselves to the ware- [424] houses, and get a representative committee from each warehouse to attend the meeting at the city hall. Now,

(Testimony of Farrel L. Hansen.)

I didn't take part in that; I wasn't a member of the committee, and I didn't know when or where, in exact detail, the meeting Saturday was to be held, until Saturday morning. They called me Saturday morning and asked me if I would attend that meeting.

Q. Did that committee come to your warehouse?

A. Yes; they did, but I didn't know when they came.

Q. Do you know how your own employees were notified of the meeting?

A. No, sir; other than I am sure one member of the committee came over and told them to come. I didn't.

Q. You don't know that they were notified by the foreman there?

A. I think they weren't. I think one of the farmers,—he may have talked to the foreman, however. I can't tell you the details as to how the ones that were asked to go were selected to go. I believe they held a little group meeting and designated from the whole number the ones to go to the meeting.

Q. Did you hear that done? A. No, sir.

Q. Isn't it true the dealers present were asked to notify their own employees? [425]

A. Not according to my understanding.

Q. Isn't it also true they were asked to get in touch with other dealers and have them make arrangements for representatives of their employees to be present?

(Testimony of Farrel L. Hansen.)

A. It was my understanding this committee was supposed to notify each warehouse, and if they didn't do that, they made other arrangements after I left the meeting Friday night. When they asked me to attend the meeting Saturday afternoon, I told one of the committee members, whoever it was called me, that perhaps it would be best if I didn't come, and they said, "No," that I was an employee of the farmers, and that I didn't have anything to win or lose, and that I should be there to answer any questions they might want to ask me, and so that is why I went.

Q. Now, Mr. Hansen, after the Union's contract was received by your association, did you on occasions talk to any growers about the contract?

A. Yes, sir.

Q. Or about the Union? [426]

A. Yes, sir.

Q. Can you estimate how many growers you talked to about that, approximately?

A. Oh, it would be such a round guess that it wouldn't mean very much. Perhaps a hundred talked to me individually, and they asked me to attend several Grange meetings, and other meetings. In fact, they were calling on me constantly to come to various growers' meetings and read the contract and discuss it with them.

Q. Did you discuss the contract with the individual growers? A. Yes, sir.

Q. Did you express the same opinion to them

(Testimony of Farrel L. Hansen.)

about the contract that you did at the Grange meetings when you spoke? A. Well,—

Q. In general? A. In General; yes.

Q. Do you recall any particular instances of discussing the contract with individual farmers or growers, so as to give me their names?

A. No.

Q. Do you recall whether you discussed the contract with Ross Wolfgang?

A. I don't recall that I did personally; no.

Q. By the way, who is Ross Wolfgang, and what position, if any, does he have in the Grange? [427]

A. Well, he is a farmer in the St. Leon area,—that is north of Idaho Falls,—and he is Master of Pomona Grange.

Q. The Pomona Grange is the head Grange for the county, is that correct?

A. That is correct.

Q. Did you talk,—did you discuss the contract with any of the local Grange masters, individually?

A. Yes, I undoubtedly did.

Q. Do you recall any such instances?

A. Not specifically; no.

Q. Did you express the same opinion to them about the contract that you did at the meetings you attended?

A. Well, yes, in a general way.

Q. Now, reference has been made here to a meeting at York Grange. Do you recall the occasion of that meeting? A. Yes, sir.

Q. Before that meeting took place, did you attend a meeting of Grange Masters? A. Yes.

(Testimony of Farrel L. Hansen.)

Q. Where was that meeting held?

A. At the Bonneville Hotel.

Q. And approximately when?

A. That was a few days prior to the York Grange meeting.

Q. Who asked you to come to that meeting, do you recall? Do you recall how you happened to go to the meeting? [428]

A. I was invited to attend. I don't recall now who asked me to come.

Q. Do you recall having a conversation with Ross Wolfgang before the meeting?

A. Well, not in detail. However, I could have had.

Q. You don't know whether you did, or not? You don't remember?

A. I don't remember that I had a conversation with him, specifically, no, before the meeting.

Q. What persons were at this meeting?

A. Which meeting?

Q. The meeting of the Grange Masters at the Bonneville Hotel.

A. Mr. E. T. Taylor was there, and Bert Higgins,—

Q. Mr. E. T. Taylor is State Grange Master, is he? A. He is Master of the State Grange.

Q. And Mr. Higgins is Master of the Local Grange.

A. It is up at Roberts, named,—I forget the name,—any way, it is the Roberts Grange. I can't

(Testimony of Farrel L. Hansen.)

recall the names of anyone else who was there, but there were some others there, I know.

Q. Do you recall that Mr. Wolfgang was there?

A. I don't recall for sure that he was there. I was trying to remember whether he was, but I couldn't testify to the fact he was. [429]

Q. Do you recall whether Mr. Trask was there?

A. I believe Mr. Trask was there.

Q. And Mr. Weston?

A. I don't believe Mr. Weston was there.

Q. What subject was discussed at this meeting?

A. They discussed the advisability of holding a general growers meeting at which time the proposition of the contract and the unionization of the potato workers should be outlined to the farmers so they might know what was going on.

Trial Examiner Barton: Mr. Reporter, will you read the question and answer, please?

(Question and answer read by the Reporter.)

Q. Specifically, what was the discussion about this idea?

A. Well, there was nothing specific gone into. It was more or less of a general conversation as to the advisability of calling a growers meeting.

Q. Did anyone express an opinion in favor of that idea?

A. I think it was unanimous, all that was there, that it should be done, because the farmers were paying the bill, and they should be interested parties to it.

Q. What was your opinion?

(Testimony of Farrel L. Hansen.)

A. Very much so.

Q. And Mr. Trask's?

A. Well, it was unanimous; and that has been my contention [430] all the way along. I think that is one failure that there has been all the way through the whole thing, that there has been no provision made whatever to take into consideration the farmer in the discussions, and he pays the bill, and he is the one who is going to suffer or benefit by it, and I think the whole thing has been faulty all the way along by that shortcoming. [431]

Q. (By Mr. Babcock:) Now, what arrangements were made at the meeting at the Bonneville Hotel with respect to calling or holding the meeting at the York Grange hall that was subsequently held? What plans were made?

A. No definite plans were made in my presence. Someone else did that, and I can't tell you who it was.

Q. Was there a copy of the union contract present at the meeting of the Grange Masters?

A. I believe there was.

Q. Was it discussed?

A. Limitedly; yes, sir.

Q. What was the last,—— A. Limitedly.

Q. Was the particular phases of it discussed between the parties present? A. No.

Q. What do you mean by discussed "limitedly?"

A. Oh, the paragraphs and terms and specifications of it was not gone into in detail, but just an over-all discussion was entered into by the people

(Testimony of Farrel L. Hansen.)

there, pointing out the fact [432] it had been presented, and that the growers should be advised of what it was, and what it meant to them.

Q. Do you recall any particular provisions of it you did discuss? A. No; I don't recall that.

Q. Do you remember that you discussed the matter of wages set forth in the contract, wage rates?

A. I don't recall that we did, specifically, at that time.

Q. Do you remember whether at that time there was a discussion of the increase in labor costs for sorting that this would mean if the union demands should be granted?

A. I don't recall that that was discussed at this meeting that you refer to.

Q. Did you at one time prepare some figures on that matter, Mr. Hansen? A. Yes, sir.

Q. When did you prepare those, or have them prepared?

A. Oh, some time during the course of this discussion,—during January or February, somewhere in there.

Q. Were they prepared before the York meeting? A. Yes, sir.

Q. Were they prepared before the Grange Masters' meeting? A. I think they were.

Q. Do you recall at that meeting you had those figures and you explained the increase in costs that would result, to the [433] Grange Masters?

(Testimony of Farrel L. Hansen.)

A. I may have done, but I don't recall it specifically.

Q. Do you recall whether you were asked at that meeting for permission for the figures to be used at the York meeting?

A. No; I didn't ask for that at all.

Q. I said, were you asked by any others present at the Grange Masters' meeting whether those figures could be used at the York meeting?

A. Yes, as I recall it, that was asked.

Q. Did you provide the figures for someone to use at the York meeting?

A. The figures I prepared were used at the York meeting; yes.

Q. Do you know who presented them?

A. I think Mr. Jack Wackerly.

Q. Did he discuss the matter with you before the meeting? A. Yes.

Q. And discuss the figures with you?

A. Yes.

Q. Was the report he made at the York meeting based on the figures you provided?

A. Yes.

Q. Or the computations you made?

A. Yes, sir. [434]

Q. You attended the York meeting? Is that correct? A. Yes, sir.

Q. And after that time you attended other meetings?

A. Yes, I am sure I did. There were meetings

(Testimony of Farrel L. Hansen.)

be constantly held and I was asked to go, I guess, to practically all of them.

Q. Do you recall what meetings you attended at local Grange halls?

A. I attended most of them.

Q. Did you attend one at Rigby on or about February 27th?

A. I couldn't say as to the date, Mr. Babcock.

Q. I refer to the one reported in the paper which was received in evidence.

Trial Examiner Barton: Suppose you show it to the witness.

Q. Have you seen this paper during the hearing here? A. No, I haven't.

(Mr. Babcock hands paper to witness.)

Mr. Babcock: Mr. Examiner, do you have those other clippings?

(Trial Examiner Barton hands to Mr. Babcock.)

A. I attended a meeting at Rigby, a Grange meeting, at which time this contract and the increased costs involved were discussed.

Q. Thank you. Did you attend more than one meeting at [435] Rigby?

A. I don't believe I did.

Q. Did you attend one more meeting at the York Grange at which this subject was discussed?

A. I probably did.

Q. Did you attend a local meeting at which it was discussed?

(Testimony of Farrel L. Hansen.)

A. There was a lot of meetings being held, and I couldn't swear to when they were or the exact time they were held.

Q. I refer you to Board's Exhibit No. 43, for identification, and I will ask you to read that clipping to yourself, and then tell me whether you attended that meeting?

A. No; I don't believe I attended that meeting.
[436]

Q. If I have got your testimony correctly, after the York Grange meeting you attended,—you were invited to attend, and did attend, Grange meetings, local Grange meetings, at various places in this vicinity, and that at those meetings [439] the question of this labor contract was discussed. Is that correct? A. Yes.

Trial Examiner Barton: Has the date of the York Grange meeting been fixed. I don't recall that it has.

Mr. Babcock: No.

Trial Examiner Barton: You don't recall the exact date of that, Mr. Hansen?

A. No, I don't.

Q. With reference to the city hall meeting, approximately how long after that would it have been?

A. I wouldn't attempt to estimate that either, for the reason there was several meetings,—there was a lot of meetings going on.

Trial Examiner Barton: Would you say it was a month later, or less, or more?

(Testimony of Farrel L. Hansen.)

Mr. Babcock: I think probably we can agree,—I am sure Mr. Weston and I can agree on the date of it. Is there any doubt about the accuracy of the clipping so far as the date is concerned, Mr. Weston?

Mr. Weston: No.

Mr. Babcock: February 23rd is the date, as I understand it.

Trial Examiner Barton: Could it have been in the month of February, Mr. Hansen? [440]

A. What was the date of the city hall meeting?

Trial Examiner Barton: January 24th, is the testimony?

A. I would say it could have been, and probably was, in the month of February.

Trial Examiner Barton: All right.

Q. (By Mr. Babcock) You didn't speak at the York meeting, did you, Mr. Hansen, the York meeting of February 23rd, is that correct?

A. I don't believe I did. There might have been one or two questions asked me, but I don't recall of anything specifically that was asked me then.

Q. At these later meetings when you did talk, was the opinion,—or the remarks you made substantially the same in all those meetings, or did it differ from meeting to meeting?

A. Oh, I would say basically they were the same, and I will say further that the newspaper reports of those meetings are not accurate as to what went on, so far as I was concerned.

Q. Did you attend the convention or meeting of

(Testimony of Farrel L. Hansen.)

the Traffic Association at Twin Falls in the latter part of March?

A. I believe that was the date. I attended a Traffic meeting over there.

Q. What was the nature of that meeting? Was it a conven- [441] tion, or just exactly what was it?

A. Oh, it was semi-social and semi-business.

Q. How long did it take place?

A. It was a dinner meeting,—I would imagine a couple of hours.

Q. Just one actual meeting, then?

A. That is the only one I knew about.

Q. One session. Was there a program, speakers?

A. Well, just informal speakers. I don't think there was any pre-arranged program.

Q. Was Mr. DeLong there? A. Yes.

Q. Did he preside at the meeting?

A. I don't believe he did. I think Mr. Simplot presided, as I recall it.

Q. Did Mr. DeLong make a report to the membership at the meeting?

A. I believe he did; yes.

Q. And do you recall on what subjects he reported?

A. No; I don't, and I will tell you why: I was seated at a very bad position in the meeting, and couldn't hear but poorly just what went on. [442]

Q. As a matter of fact, whether you actually heard it or not, Mr. Hansen, or whether it was re-

(Testimony of Farrel L. Hansen.)

ported to you after the meeting, it was decided at the meeting, was it not, that because of the action that had been taken by farm groups, [445] that the shippers would not undertake to negotiate contracts with the union at that time?

A. I don't recall that was the action of the meeting at Twin Falls.

Q. That had been the decision of the shippers in Idaho Falls, that is true, isn't it?

A. I don't say that was the decision of the shippers; no. I would say that was one thing that was seriously considered by them.

Q. And there had been considerable discussion at Idaho Falls in your meetings prior to the time of this meeting in Twin Falls on that subject, hadn't there? A. Yes. [446]

Q. Do you recall the meeting that has been referred to here where Mr. Owen attended and spoke to some farmers and dealers which was held at the Bonneville Hotel? A. Yes, sir.

Q. Did you attend that meeting?

A. Yes, sir.

Q. Did you attend the meeting of the Traffic Association the following Monday?

A. I can't recall that. [447]

Q. Do you remember on what day of the week the meeting Mr. Owen spoke at was held?

A. No; I don't.

Q. Well, after that meeting, was there a discussion of the meeting at the Bonneville Hotel at your Traffic Association meeting?

(Testimony of Farrel L. Hansen.)

A. I don't recall that there was any discussion at one of the Traffic Association meetings of the meeting at the hotel. There could have been, however.

Q. I refer you to Board's Exhibit No. 44 for identification. Will you glance through that article, please?

A. Which one?

Q. That is a continuation, I think.

(Witness reads exhibit.)

Q. Have you read it?

A. Yes, sir,—that is, I glanced through it, read the essence of it.

Q. In glancing through that, does that refresh your memory as to the Traffic Association meeting which immediately followed the meeting at the Bonneville Hotel?

A. Yes.

Q. Did you attend that meeting?

A. I believe I was there when Mr. Luke Williams was at that meeting.

Q. Mr. Williams had been present at the meeting at the [448] Bonneville Hotel at which Mr. Owen spoke?

A. Yes, I believe he was there.

Q. Who else besides,—in addition to the members of the Traffic Association and Luke Williams,—what other persons were present at the Traffic Association meeting?

A. I can't tell you that. I couldn't honestly recall any one in detail that was there.

Q. Do you recall whether E. T. Taylor was pres-

(Testimony of Farrel L. Hansen.)

ent at the Traffic Association meeting I am speaking of?

A. I believe he was there. I wouldn't be sure of that, though. I wouldn't be sure Mr. Taylor was there.

Trial Examiner Barton: Tell what you remember.

A. Mr. Luke Williams made a short talk at that meeting, emphasizing the importance that the farmers be represented in any negotiations with the union and be advised as to what was taking place.

Trial Examiner Barton: Did any of the shippers at the meeting say anything, if you recall now?

A. That seemed to be of the general opinion,——

Trial Examiner Barton: You mean some of them expressed [449] themselves to that effect?

A. Yes; that is another thing reported there, that there was some talk that it might be necessary to move the equipment over to the farmers and let them do their own work.

Q. (By Mr. Babcock) Did you, yourself, speak? A. I believe I did.

Q. Was there a newspaper reporter present?

A. Not to my knowledge.

Q. What else was said there at that time?

A. I think that was all.

Q. Was there any farmers or growers there?

A. There might have been one or two. I don't think there were very many.

Q. Do farmers ordinarily attend those meetings?

(Testimony of Farrel L. Hansen.)

A. Well, quite often there is, you know, a few in; not very many.

Q. By that you mean there are a few who usually come, particular persons?

A. I know it has been the policy of all of our meetings,—they are open and informal, and frequently they drop in.

Q. Are there any particular farmers who come to your meetings? A. Regularly?

Q. Not regularly; frequently. [450]

A. Yes; I would say at approximately one-half of the meetings there is one, or more, farmers present. [451]

Q. Mr. Hansen, we mentioned before the figures that were prepared to show the increase in sorting costs as a result of the Union's demands, and if the contract were negotiated as presented. Did you prepare those figures yourself, or did you have them prepared in your office?

A. I had the office prepare them, and there has been quite a lot of misinformation published in regard to them, which I would like to explain.

Q. Will you explain on what basis the figures were prepared?

A. The figures were prepared to illustrate the difference between the previous season's operations and what the terms of the contract would mean to our association. That was done on the instructions of my board of directors. Later,—

Q. Figured for your particular operation?

A. It was, to start with. Then it was later re-

(Testimony of Farrel L. Hansen.)

quested that be interpreted in an approximate way for what it might mean to the state of Idaho as a whole.

Q. Now, I want to be sure I understand correctly this eighty-seven per cent that has been referred to. This represents, as I understand it, the increase that would result in sorting labor costs under the wages the Union had in its contract,—proposed contract, as compared with what the wages had cost during the season of 1940-'41. Is [454] that correct?

A. Yes, sir.

Q. It was not a contrast with the wages that were actually in effect at the time the Union contract was presented?

A. That is absolutely correct. That point should be cleared up.

Q. As a matter of fact, at the time,—at the commencement of the 1941-'42 season were the wages higher or lower, or were they the same, as they had been the previous season?

A. They had been, I think, increased twice in the early part of the 1941-'42 season, and they were higher at the time the contract was submitted than they were at the time I used these figures to compile this information, and the reason I used the 1940-'41 season is because that is the only record we had of the man-hours labor we used which could be interpreted for a season as a whole.

Q. Couldn't you have used the wages that were

(Testimony of Farrel L. Hansen.)

prevailing at the time and estimate what the cost would be for the season under the prevailing wages?

A. Yes; we could have done that.

Q. Did you do that?

A. Any time I submitted those figures, I submitted them with that explanation.

Q. If that had been done, the difference between what the wages were and what they would be under the Union's demand [455] would not have been eighty-seven per cent?

A. No; it would have been less than that.

Q. Much less, wouldn't it?

A. Well, not much less; some less.

Q. What was the difference between the Union's requested union scale and the prevailing scale at the time the contract was presented?

A. In round figures, the 1940-'41 wages was forty cents an hour, and at the time the contract was submitted the wages paid were fifty cents,—or fifty to fifty-five cents, and the union wage was approximately seventy-five cents an hour.

Q. Seventy-five cents for all classifications?

A. No, but I think it would average about that, as I remember it.

Q. This forty cent figure you gave me, that was for common labor, the lowest classification?

A. No; that was our average. We took all of our man-hours and divided it into the total payroll, and in that way we got an average, unless we used the previous season,—

Q. I am not talking about that. I am asking you

(Testimony of Farrel L. Hansen.)

what the prevailing basic, or minimum rate was in 1940-'41? A. I think forty cents.

Q. Forty cents?

A. As I recall, that is what it was. [456]

Q. And in 1942, at the time the Union contract was presented, what was it?

A. Well, I haven't averaged,—

Q. The basic, minimum wage is what I am talking about. A. I think it was fifty cents.

Q. And in some operations, fifty-five cents?

A. Yes. However in 1940-'41 there were some wages which were forty-five cents, which we took, as I explained, and got an average wage, which was forty and a few tenths cents per hour. It was not for purposes of misleading anybody, Mr. Babcock, that we used those figures. It was for purposes of more complete information.

Q. As a matter of fact, they did become misleading during the course of this controversy, didn't they?

A. The newspapers misquoted them on several occasions.

Q. (By Mr. Babcock) Mr. Hansen, in the discussions you had with individual growers at the time the Union's contract was first present, and before, was it the general opinion as expressed to you by these growers that the organization of these workers would mean wage increases in the [457] sorting sheds, and consequently would reduce the price of potatoes? A. Yes, sir.

(Testimony of Farrel L. Hansen.)

Q. Was that the general opinion?

A. That was the general opinion; yes, Mr. Babcock.

Q. And were they somewhat concerned about that?

A. Yes, sir.

Q. And because of that fact were they, and in their conversations to you, did they express an opinion of opposition to the Union organizing these workers?

A. Yes; that would be my opinion that was the underlying reason why that was true.

Q. You think that was a strong feeling among the farmers generally in the locality?

A. Yes; I would say it was.

Q. And I presume you knew that from almost the outset of this thing, did you not?

A. Yes.

Q. And in fact you knew that at the time you attended these various Grange meetings?

A. Yes, sir.

Q. And before you attended them?

A. Yes, sir.

Q. And you expected, when you attended those meetings, that the general attitude of the farmers at the meetings [458] would be one of opposition and hostility to the Union, isn't that correct?

A. Well, opposition to the procedure being taken.

Q. Do you recall attending a meeting of the Traffic Association on April 27th of this year?

A. No, sir; I wouldn't,—

Q. Perhaps I can refresh your recollection on the date. It was the date you had, I think, two

(Testimony of Farrel L. Hansen.)

conversations with me in my room at the Rogers Hotel at the time I was here in connection with these cases. Do you remember those conversations you had with me?

A. Yes, sir; I remember them.

Q. At which Mr. Weston was present?

A. Yes, sir. I thought there was only one, though. I don't remember of two.

Q. Do you recall you and Mr. Weston came to my room at approximately two o'clock in the afternoon one day and had a discussion with me, and subsequently the same evening we talked again, in more detail?

A. Yes; I believe that is right.

Q. What was the subject discussed in the afternoon at the time you came in?

A. I can't tell you in detail what was discussed.

[459]

Q. Do you recall at that time,—or in a conversation between me and Weston and you in April in my room, the question was discussed of whether these workers were agricultural workers?

A. I don't recall that that was discussed in your room. It might have been, but I wouldn't want to say it was, Mr. Babcock, because I don't recall that it was. [461]

Q. Do you recall of attending a meeting of the Traffic Association the same day, or the day before Mr. Weston and [462] you and I talked in the hotel?

A. I wouldn't want to say we attended a Traffic

(Testimony of Farrel L. Hansen.)

Association meeting the day before I visited you in the hotel.

Q. Or a meeting of the employers to whom the Union had submitted contracts?

A. There were so many meetings right about that time that I can't remember which one was which.

Q. Do you remember a meeting when the employers, or of the Traffic Association, when there was a discussion of whether these workers were agricultural workers?

A. That was discussed at many meetings; not at just one meeting.

Q. Did there come a time in those discussions when it was decided by the shippers they would object to the jurisdiction of the Board on the ground these persons were agricultural workers?

A. As I recall that was discussed. I don't know whether it was definitely decided upon or not. That seemed to be the consensus of opinion.

Trial Examiner Barton: Was that opinion expressed at the Traffic Association meetings at any time?

A. Not in a conclusive way. It was more in a conversational form.

Trial Examiner Barton: You heard it expressed that way? [463]

A. Yes; in fact that seemed to be the general opinion of the farmers who I talked to, also.

Mr. Babcock: I ask to have this document marked as Board's Exhibit No. 53, for identification.

(Testimony of Farrel L. Hansen.)

(Thereupon the document hereinabove referred to, was marked as Board's Exhibit No. 53 for identification.)

Mr. Babcock: Do you agree, Mr. Weston, this is your signature?

Mr. Weston: Yes.

Mr. Babcock: Is that correct?

Mr. Weston: Yes.

Q. Did you read through that letter?

A. No; I didn't. I can't even read the signature, if it wasn't written on the typewriter. I wouldn't know what it was. (Witness reads paper.) I have read it.

Q. Does that refresh your recollection as to the events that took place on that particular date?

A. You mean up in your room?

Q. Yes, in my room, and at the meeting of the Traffic [464] Association.

A. I don't recall that was discussed in detail in our conference. I don't believe it was.

Q. Do you recall the meeting Mr. Weston refers to in the second paragraph of the letter?

A. I don't recall of a meeting which was held at which time any definite action was taken by the employers to that extent.

Mr. Babcock: I will offer this letter in evidence as Board's Exhibit No. 53.

Mr. Weston: Let me see it. I haven't seen it.

(Mr. Babcock hands to Mr. Weston.)

Mr. Weston: No objection.

(Testimony of Farrel L. Hansen.)

Trial Examiner Barton: It is admitted.

(Whereupon, the document heretofore marked Board's Exhibit No. 53 for identification, was received in evidence.)

BOARD'S EXHIBIT NO. 53

Idaho Falls, Idaho

April 27, 1942

Mr. William Babcock,
National Labor Relations Board
Rogers Hotel,
City.

Dear Mr. Babcock:

Confirming our conversation and meeting of this afternoon, I would like to submit the position of the potato packers to you in writing, so that I may have your position in return and also in writing.

At a meeting of these packers today, in reviewing the recent Idaho Supreme Court cases wherein our Supreme Court has held that the employees working in these potato sheds are agricultural workers, these packers instructed me, as their representative, to inform you for them individually that they object to the jurisdiction of the National Labor Relations Board over their employees.

However, in order to accommodate you—if we may do so without waiving any of our rights—we will assist you in your investigation providing you will assure us that we will not thereby jeopardize our right to raise this question of the jurisdiction of

(Testimony of Farrel L. Hansen.)

the National Labor Relations Board over our employees.

We prefer to have this assurance from you in writing for the purposes of our record and so that there will be no misunderstanding, we repeat that we, as potato packers, object to the jurisdiction of the National Labor Relations Board or the National Labor Relations Act over our employees.

Very truly yours,

E. A. WESTON

Eli Weston

Attorney.

EW/F

Trial Examiner Barton: What is the date of that letter?

Mr. Babcock: April 27th. Perhaps, to make the record complete, I will offer a copy of the reply letter from me to the letter. Do you agree, Mr. Weston, that is an accurate copy of the letter I gave you that day?

(Thereupon, the document hereinabove referred to, was marked as Board's Exhibit No. 54, for identification.) [465]

Mr. Weston: Yes.

Trial Examiner Barton: It is admitted.

(Thereupon, the document heretofore marked Board's Exhibit 54 for identification, was received in evidence.)

(Testimony of Farrel L. Hansen.)

BOARD'S EXHIBIT No. 54

April 27, 1942

Mr. E. A. Weston
Attorney at Law
Bonneville Hotel
Idaho Falls, Idaho

Re Idaho Falls Potato Growers Association
et al Cases No. XIX-C-1116 et al.

Dear Mr. Weston:

This will acknowledge receipt of your letter of even date, in which you state that the potato packers whom you represent object to the jurisdiction of the National Labor Relations Board over their employees on the ground that they are agricultural workers.

You state that you will assist me in my investigation of these cases providing I assure you that by so doing you do jeopardize the right of your clients to raise the question of jurisdiction.

It is my opinion that by such assistance and in furnishing information and making witnesses available to me you are not in any way waiving any rights to object to the jurisdiction of the Board over these employees in the event of hearings or other proceedings by the Board in these cases. You may be assured that I understand that you have and are objecting to the assertion of jurisdiction by the Board in these cases and that any information or data furnished by your clients has and will be furnished with the understanding that the employ-

(Testimony of Farrel L. Hansen.)

ers are not admitting that the Board has jurisdiction over their employees.

Yours very truly,

WM. A. BABCOCK, JR.

Attorney.

Trial Examiner Barton: What is the date of your reply, Mr. Babcock?

Mr. Babcock: The same day, April 27th.

Q. (By Mr. Babcock): So we will be straight on this, Mr Hansen, is it your testimony that you do not recall any meeting with me and Mr. Weston in April, where the subject of the agricultural status of these workers was discussed?

A. Yes; I don't recall that was discussed while we were up there together.

Q. Do you recall that you met with me more than once and conversed with me?

A. I think I met with you in the afternoon, and then in the evening I met with you when my foreman was over there.

Q. That is correct. Do you recall in the afternoon meeting Mr. Weston and I and you discussed the matter of the shippers going ahead and bargaining with the Union in these cases?

A. No; I can't say that I do. That is entirely foreign *foreign* from my recollection of what occurred.

Q. Would you say that did not occur? [466]

(Testimony of Farrel L. Hansen.)

A. No; I wouldn't want to say it did, or did not. I don't recall that it did.

Q. Isn't it a fact at that time I suggested to Mr. Weston that the best solution of this controversy was for the shippers in those operations where the Union had a majority was to proceed to bargain with the Union?

A. I don't recall ever having heard that statement. [467]

Re-direct Examination

Trial Examiner Barton: Mr. Hansen, I am not entirely clear as to the nature of these Traffic Association meetings. They have been testified to a number of times as having been held on Mondays. First, where have those meetings been held?

A. Well, they are held at different places, Mr. Examiner; some of the time at the Bonneville Hotel in a room that would be large enough to take care of the number that would attend. Most of the meetings this past year have been held in the basement of the Covey Cafe. They have a dining room downstairs.

Q. Trial Examiner Barton: Are they usually luncheon meetings?

A. Yes; and they are very informal.

Trial Examiner Barton: Does somebody preside?

A. Well, sometimes yes; and sometimes no.

Trial Examiner Barton: When somebody does preside, is that always the same individual?

A. No, sir.

(Testimony of Farrel L. Hansen.)

Trial Examiner Barton: Has any one individual pre- [470] sided more than any of the others?

A. Yes.

Trial Examiner Barton: Who?

A. I would say that Mr. DeLong has lead the discussions and presided more than anyone else.

Trial Examiner Barton: How long do those meetings usually last?

A. Oh, an hour to an hour and a half, usually about an hour and fifteen minutes. For your information, Mr. Examiner, it has been more or less of a custom here for many years prior to the time that the Traffic Association was organized, that Monday is usually kind of a slow day; the market is a little slow opening up, and we just voluntarily met together in an informal group, and we would have discussions, and kidding back and forth, sometimes serious, and sometimes playful.

Trial Examiner Barton: Have you continued to have those meetings during Mr. DeLong's present illness?

A. Yes, although I am not sure they have been regular. I have been away, however, quite a bit of the time.

Trial Examiner Barton: Have you attended any during his illness?

A. Yes, sir.

Trial Examiner Barton: Has anybody been presiding at those meetings? [471]

A. Yes.

Trial Examiner Barton: Who?

A. Mr. C. R. Holden took charge one time I was

(Testimony of Farrel L. Hansen.)

there, and Mr. Chris Christensen took charge another time when I was there.

Trial Examiner Barton: What is the average attendance at those meetings, would you say?

A. I would say approximately twenty. That would be hitting it pretty close,—fifteen to twenty.

Trial Examiner Barton: Do the members of the Association pay dues? A. Yes.

Trial Examiner Barton: And one who doesn't pay dues, I suppose, loses his membership? Is that correct?

A. Everybody attends, whether they pay dues or not. That is not a requirement of attendance. They leave it more or less up to the individual, if he wants to contribute to help pay rent on the office.

Trial Examiner Barton: If he wants to be a member he has to pay dues to be a member, but he may attend the meetings without paying his dues?

A. That is correct. That is the situation. It is rather a loosely formed association or organization.

Trial Examiner Barton: Now along, say, in February and March and April of this year, at the time of the Traffic [472] Association meetings on Mondays, were the discussions, as you remember them, pretty much the same? Did they run along any one given channel at that time?

A. They covered quite a wide variety of subjects, if that is what you mean.

(Testimony of Farrel L. Hansen.)

Q. Was the question of the Union discussed frequently at that time?

A. Yes; I would say it was discussed at practically every meeting during the time it was an active consideration.

Trial Examiner Barton: You probably can't remember what was said about it at any one meeting, but I am wondering if, according to your recollection now, what was said and discussed at the various meetings about the Union would be about the same?

A. Yes; I would say it would be approximately the same throughout the entire period.

Trial Examiner Barton: What was the substance of the discussion about the Union?

A. My impression of the discussion and sentiment as expressed by the various boys was that they were not prejudiced against the Union; that they were willing to go along if it could be worked out on a basis that would be agreeable and not jeopardize the operations. Now, as to the details,—sometimes the details of the contract came up for discussion, and there were expressions made of apprehension as to the practicability of its provisions, and there were other parts of it that they felt were satisfactory and maybe could be worked out.

Trial Examiner Barton: Were resolutions ever passed in these Association meetings?

A. Not that I recall of.

Trial Examiner Barton: That is, on any sub-

(Testimony of Farrel L. Hansen.)

ject, either about the Union, or about other matters?

A. Not that I recall of, and I think there is another point that should be brought out here, Mr. Examiner, with regard to those matters. By virtue of the fact that some of the boys were members, and some weren't, most of the business that was conducted was not a matter of business of the Traffic Association.

Trial Examiner Barton: There is one place I am puzzled. There has been quite a little testimony here that the meetings were rather informal, and I am a bit puzzled as to what you mean by the business they did. What do you mean by that?

A. Like the discussions, or maybe committee appointments, or expressions; or the instructions to Mr. Weston, for example. In other words, it wasn't a matter of Traffic business, because there were too many of our attendants there and taking part that didn't belong to the Association, yet who were interested in and taking part in the discussions and activities. I don't think there were any minutes kept. [474]

Trial Examiner Barton: The meetings were known as Traffic Association meetings, were they, even though there were outsiders attendings?

A. I would say that the general assumptions is that they were sponsored by the Traffic Association, or arranged for by it.

Trial Examiner Barton: Well now, I want to go to another subject. As I understand it, along about

(Testimony of Farrel L. Hansen.)

the time of the York Grange meeting you testified about, you attended over a period of weeks at that time a number of Grange meetings?

A. That is correct.

Trial Examiner Barton: And what you said and did at these various meetings was substantially the same? A. Yes, sir.

Trial Examiner Barton: Well, now, just state what you said and did at these meetings. I want to be clear about that.

A. All right. The primary reason, I am sure, why I was asked to come to these various Grange meetings was the result of the fact that I am manager of a Farmers' Co-op.

Trial Examiner Barton: That is probably true. Now, tell us what you said and did.

A. When I was asked to speak, or outline what was going on with regard to the unionization of the potato workers, and [475] the terms that were included in the contract that had been submitted to our organization, I took the position with the growers, and told them,—

Trial Examiner Barton: You mean you did this at the Grange meetings? A. Yes, sir.

Trial Examiner Barton: All right.

A. In other words, I am trying to give you a picture of what was going on in my mind, and I told them that it was a matter of much concern to them in that they were going to have to carry the load of any additional costs that might arise as a result of the boys joining the Union and demand-

(Testimony of Farrel L. Hansen.)

ing higher rates of pay, and other changes in their working conditions. I told them I thought it was important for them to get themselves in position to set down and reach an intelligent decision with the boys themselves, the Union, or whoever it might be, so that their interests could be properly and adequately taken care of. I know I expressed on two or three occasions apprehension as to the ability of the leaders of the Union who had been sent into this community in analyzing and deciding what was the best and right thing to do in directing the policies of our potato workers. I have learned from conversations with both Mr. Ray Hansen and Mr. Owen that he had had no previous experience in the potato shipping business, and that they [476] were unacquainted with the problems incident to the fluctuating nature and perishable nature of our industry.

Trial Examiner Barton: Did you report that fact at these Grange meetings?

A. Yes; and I also reported it to both Mr. Hansen and Mr. Owen personally. I have never had a prejudice toward the boys joining a Union. In fact, I am friendly to the idea.

Trial Examiner Barton: Were the Grange meetings open meetings, or were they closed and limited just to members of the Grange, if you know?

A. They are closed in some instances; and in some instances they hold open meetings.

Trial Examiner Barton: At these Grange meet-

(Testimony of Farrel L. Hansen.)

ings you attended, did any potato workers come to the meetings?

A. I know during the course of the early spring and late winter there were potato workers in various meetings I attended.

Trial Examiner Barton: Of the Grange?

A. Not closed meetings, but meetings sponsored by the Grange.

Trial Examiner Barton: Some of the meetings you attended along early in 1942 were closed Grange meetings, and others were sponsored by the Grange and open to anybody who wanted to come? Is that the situation, Mr. Hansen? [477]

A. That is correct. I also told the Grange members and farmers that I thought it was important that inasmuch as this was in the nature of a taxation they should have representation.

Trial Examiner Barton: Did you ever tell the growers that you thought it was unfortunate that the Union had come into this area at that particular time?

A. I don't recall that I ever made that statement.

Trial Examiner Barton: Now, to go to one other subject: I believe you testified the other day that the respondent Idaho Potato Growers have a warehouse both here and at Shelley. Is that the situation? A. That is correct.

Trial Examiner Barton: How do the operations carried on at Shelley differ from those carried on at Idaho Falls, if they do differ at all?

(Testimony of Farrel L. Hansen.)

A. I would say they are the same.

Trial Examiner Barton: What about the size of the two warehouses?

A. Well, Shelley would be relatively one, and Idaho Falls would be relatively four.

Trial Examiner Barton: Four to one?

A. Yes, sir; pretty close.

Trial Examiner Barton: You have a foreman at Shelley, do you? [478]

A. Well, we call him a Branch Manager. They really assume a little more responsibility and authority than the average foreman.

Trial Examiner Barton: Just what powers does he have?

A. Well, he has the right to hire and fire men; he takes the responsibility of arranging for supplies from the growers to the specific orders we have on file, determining the quality of the potatoes that shall be used for different customers' requirements. In other words, it is a financial responsibility. If his judgment is wrong, it would naturally be bad.

Trial Examiner Barton: Does he communicate with you frequently? A. Very frequently.

Trial Examiner Barton: How often every day does he?

A. Usually, when we are busy, from five to ten times a day.

Trial Examiner Barton: He asks your advice on this and that during the day?

A. Yes, sir; that is right.

(Testimony of Farrel L. Hansen.)

Trial Examiner Barton: That is done, I suppose, by telephone? A. Yes, sir; entirely.

Trial Examiner Barton: I believe you testified the other day there is not often any transfer of help from one [479] warehouse to the other?

A. That is very seldom; it is just in emergencies when we do that.

Trial Examiner Barton: What do you mean by that?

A. If we would get an unusually heavy run of potatoes at Shelley so that the men available at that plant couldn't handle them, then we would send a crew down from Idaho Falls to help him through that period of rush.

Trial Examiner Barton: Well, with respect to these crews that are sent out to the farms, is it ever the case you get so busy at Idaho Falls, say, that you ask Shelley to send out a crew from there?

A. Well, yes; there are some cases where that would happen.

Trial Examiner Barton: That is right?

A. Yes; that has happened.

Trial Examiner Barton: And I suppose that works the other way, too,—the other way around, too? A. That is correct.

Trial Examiner Barton: The type of work they do would be identical work? A. Identical.

Trial Examiner Barton: Now, what is that term, Mr. Babcock, that we weren't sure we had in the record clearly?

Mr. Babcock: Roughing.

(Testimony of Farrel L. Hansen.)

Trial Examiner Barton: Roughing. So that the people [480] back in Washington when they read the record will know what we are talking about, will you tell us what is meant by "roughing?"

A. That is a sacking operation during which the potatoes are shoveled up from the bulk pile in the cellars to the sacks and the grade is not made during this operation. It is usually an operation to remove the culls from the package, leaving a mixture of 1's and 2's.

Trial Examiner Barton: "1's" and "2's," referring to the grade I suppose?

A. Yes; United States No. 1 grade, and United States No. 2 grade.

Trial Examiner Barton: Is roughing known by any other term commonly?

A. Yes, "scalping." I can't think of any other. I think those two are about all. [481]

Mr. Babcock: Mr. Examiner, we have reached a stipulation disposing of considerable testimony on the fact of the number of these meetings and we have a copy of it here in fairly rough form, but which I believe the reporter can readily follow. I believe the best procedure would be to give it to him and have it copied into the record.

Trial Examiner Barton: Is it agreeable to give the stipulation to the reporter and have it copied into the record, is that agreeable with you Mr. Weston?

Mr. Weston: Yes.

Mr. Babcock: Here, Mr. Reporter. (Hands stip-

(Testimony of Farrel L. Hansen.)

ulation to Reporter, and same is copied into the record, as follows:) [486]

Stipulation

“It is hereby stipulated that the following statement of facts may be received in evidence to have the same force and effect as if adduced during the hearing by witnesses but without prejudice to any party to introduce further evidence concerning the matters covered hereby.

Meeting in Bonneville Hotel of January 23, 1942. This meeting was attended by a number of farmers and growers. At this meeting the fact that the union was organizing the employees of the potato shippers was discussed. The concensus of the expression by those present, both farmers and shippers, was that such organization was against the best interests of the farmers and shippers, and would increase the cost of packing potatoes, and that efforts should be made to discourage it and that the grievances and working conditions of such employees could be handled more satisfactorily between the workers and the farmers and shippers than through the union. It was decided at the meeting to appoint a committee to meet with representatives of the workers to ascertain what their grievances were and what improvements in working conditions the workers wished and to arrange a plan so that grievances and conditions of employment could be discussed directly between the workers and the farmers and shippers or through a local union of such employees. [487]

(Testimony of Farrel L. Hansen.)

It was arranged at the meeting that a meeting with representatives of the employees should be held the next day and the shippers present would arrange for their crews to be represented and would notify other shippers to do the same. This plan was carried out and the employees of the following shippers and others were present at the meeting in the City Hall, January 24, 1942; Idaho Falls Potato Growers, L. S. Taube and Company, Holden Brothers, Inc., W. P. Wilson, S. Friedman & Son, Idaho Falls Warehouse Company, J. E. O'Neil, A. G. Stuart.

The workers who were on duty and given permission to be at this meeting were paid by their employers for the time spent attending the meeting.

Shortly before February 23, 1942, a meeting of Masters of several local Granges in Bonneville County, Idaho, was held at the Bonneville Hotel. In addition to the Masters, present at the meeting were a few other farmers, Eli Weston, E. S. Trask, Farrell Hansen, and E. T. Taylor were present. The Grange Masters and farmers present were: Art Lundgren, New Sweden Grange; L. B. Thompson, St. Leon Grange; Jack Moir, York Grange; Ross Wolfgang, Pomona Grange; Bert Higgins, Market Lake Grange.

This meeting was arranged by Mr. Wolfgang following discussion with Mr. Farrell Hansen and Mr. E. S. Trask and various farmers of the proposed agreement which had been submitted to the potato shippers by the union. [488]

At the meeting the unions proposed agreement was discussed. Mr. Weston explained some of its

(Testimony of Farrel L. Hansen.)

provisions. The increase in sorting costs that would result if the wages set forth in the agreement were adopted was also discussed. After discussion it was decided by the Masters to call a mass meeting of farmers and to have the contract and its effect on the industry explained. A program for such meeting was planned. It was arranged that Mr. Bert Higgins, a farmer and Grange Master, should make a statement; that an explanation of the extent to which the wages requested by the union would increase sorting costs should be made by Mr. John Wackerli, a farmer. Mr. Jack Moir, a farmer and Grange Master, agreed to make the York Grange Hall available for the meeting.

The meeting planned as described above was held at the York Hall on February 23.

A meeting was arranged by Farrell Hansen and Eli Weston at the request of Lee Owen, to be held in the Bonneville Hotel March 7, 1942. This meeting was attended by farmers, shippers and Lew Owen, Ray Hansen and some employees of the shippers and some other persons. When Owen, Hansen and the employees left the meeting, the farmers and shippers remained and continued to discuss the matter of the proposed union agreement, the activities of the union in the locality, the desirability of the workers being represented by the union, and whether the shippers to whom agreements had been presented should [489] negotiate or sign agreements with the union. A resolution was adopted by those present reaffirming the resolution adopted at the meeting at the York Grange Hall on February 23. A committee was selected for

(Testimony of Farrel L. Hansen.)

the purposes of sending messages to members of Congress and Government officials concerning the matters discussed at the meeting, and to keep in touch with further developments and arrange for appropriate action to be taken. The members of the committee selected were: Bert Higgins, Jack Moir, Rulon Debus, Wilford J. Taylor, Arthur Lundgren, and E. T. Taylor.

The messages above referred to were prepared and sent by the committee. The text of the message sent was printed in the Idaho Falls Post-Register of March 12, 1942.

Included among the growers present at the meeting on March 7th were George Hersley, Jack Moir, Lou West, Emil Johnson.

Included among the potato shippers present were the Respondents or representatives of the Respondents in this case with the exception of A. G. Stuart, W. P. Wilson, and George Peters of S. Friedman & Co.

A meeting of the Idaho Traffic Association was held in Twin Falls, Idaho, on March 21, 1942.

At this meeting subject of labor union organization of employees in potato sorting crews and potato warehouses in the Idaho Falls and other areas was discussed. Carl DeLong reported [490] that the shippers in the Idaho Falls section to whom contracts had been presented by the union had decided they could not bargain with the union at that time because of the action which had been taken by farmers. No formal action or decision was reached regarding labor matters at the meeting.

(Testimony of Farrel L. Hansen.)

The article in the Salt Lake Tribune of March 23 concerning this meeting is not a complete summary of all discussion and action at the meeting but the statements made in it are substantially correct.

At the convention of the Idaho Traffic Association held at Sun Valley in June, 1941, Mr. E. T. Taylor was an invited speaker. The substance of his remarks at the meeting are accurately summarized in the article in the Salt Lake Tribune of June 28, 1942." [491]

Mr. Babcock: I wish to state the following proposed stipulation:

During the 1941-1942 season the growers' sales of potatoes of Holden Brothers Incorporated were 739 cars; of this amount 610 cars were shipped directly outside the State by Holden Brothers, Incorporated. 129 cars were sold by the corporation for cash on the track in Idaho Falls. The greater portion of such potatoes were shipped outside the State by the purchasers thereof. During the 1942 season Holden Brothers, partnership, from the commencement of the season to November 4th, 1942, [493] sold and shipped 106 cars of potatoes. In excess of 75 per cent of such potatoes were shipped to points outside the State of Idaho direct. Of this total 35 cars consisted of potatoes grown by persons other than the partnership and purchases from them by the partnership. 71 cars of this quantity were grown on land owned or leased by Holden Brothers, partnership. The estimated quantity of potatoes grown by,—grown on land

(Testimony of Farrel L. Hansen.)

owned or leased by Holden Brothers, which has not yet been sorted or shipped, is 45 cars.

Trial Examiner Barton: Is that agreeable, Mr. Weston?

Mr. Weston: Yes.

Mr. Babcock: I have one further stipulation to propose. By way of correction of the stipulation which we entered into November 3rd, with respect to the business of these various respondents. It is stipulated that paragraph in that stipulation appearing on page 164 of the transcript which begins with the words, "In all cases," shall be changed to read as follows: "In all cases where the shipper purchases potatoes from the growers with the understanding that the shipper or dealer will do the sorting or packing with his own crew in the cellar of the grower, some sort or grade is made in the grower's cellar. In the Fall season at the time of harvest, for a period for approximately four to six weeks, a substantial quantity of potatoes so purchased are trucked directly from the field to the warehouses and sorted and packed there. The balance of the [494] potatoes so purchased at this time are usually first sorted in the yard of the farmer."

Mr. Weston: I wonder if you would mind changing the word to "early" instead of "Fall"?

Mr. Babcock: Off the record.

Trial Examiner Barton: Off the record.

(Discussion off the record.)

Mr. Babcock: Will you insert after the words "Time of harvest," the following: "For a period for

(Testimony of Farrel L. Hansen.)
approximately four to six weeks.” (Correction previously made as indicated in above reading of the stipulation.)

Trial Examiner: All right. For the record now. Mr. Reporter will you now read back the last stipulation as you have it?

(Whereupon, the stipulation was read back as indicated in the last corrected form.)

Trial Examiner Barton: Agreeable?

Mr. Weston: Yes.

Mr. Babcock: It is agreeable. Mr. Wolfgang, will you take the stand?

R. A. WOLFGANG

called as a witness by and on behalf of the Board, being first duly sworn was examined and testified as follows:

Trial Examiner Barton: State your full name please?

The Witness: My full one? [495]

Trial Examiner Barton: Your full name.

The Witness: Rossell Harold Wolfgang.

Direct Examination

(Mr. Babcock) Where do you live Mr. Wolfgang?

A. Idaho Falls, Route two, known as the St. Leon district.

Q. What business are you engaged in?

A. Farming.

(Testimony of R. A. Wolfgang.)

Q. How long have you been engaged in the business of farming? A. In,—

Q. (Continuing): In this community?

A. In that particular district about 12-14 years.

Q. Had you farmed *in the* in this district before that time?

A. Not right in the Valley; I had been on a dry farm for a few years before that.

Q. As a farmer do you raise potatoes annually?

A. For the past 14 years I have been out there, yes.

Q. Do you hold a position with the Grange?

A. I do.

Q. What position? A. Pomona Master.

Q. How long have you held that position? [496]

A. Two years.

Q. Will you explain what the Pomona Grange is; how it differs from local Granges?

A. The Pomona Grange is known as a district or county Grange; it constitutes the members of the various members in the various districts or county Grange.

Q. In what county is that?

A. Jefferson.

Q. Did you attend a meeting at the York Grange hall in February of this year, which was attended by farmers from other localities and other Granges' representatives?

A. In February? I believe so. I think that is one of the dates; I wouldn't swear on dates. That's something that's hard to say.

(Testimony of R. A. Wolfgang.)

Q. Did you attend such a meeting at approximately that time? A. Yes.

Q. I will refer you to Board's 41 for identification, which purports to be a clipping from the Idaho Falls Post-Register of February 24th; will you look through that and see whether that purports to be an account of the meeting you referred to? A. Could be.

Q. Do you recognize some of those matters as having been [497] discussed at the meeting?

A. Yes.

Mr. Weston: Well, Mr. Examiner,—

Mr. Babcock: I am just trying to fix the date of the meeting at this time, Mr. Weston, that's all.

Mr. Weston: Oh, I thought we stipulated.

Q. (Mr. Babcock): Who presided at that meeting, Mr. Wolfgang?

A. I did, if that is the meeting I have in mind.

Q. Approximately how many persons were present?

A. Roughly estimating, approximately 300.

Q. And how long did the meeting last, approximately? A. Approximately 3 hours.

Trial Examiner Barton: Where was that meeting held?

The Witness: In the York Grange hall.

Q. (Mr. Babcock): Will you relate for us the substance of what was said and done at the meeting, as near as possible, in the order that it took place? [498]

(Testimony of R. A. Wolfgang.)

A. Well, to state what takes place there is pretty hard from memory for me, and it is quite a little while ago. But the subject of this here contract with the potato growers was brought up and discussed very thoroughly pro and con. [499]

Q. Very well. Go ahead and tell the balance that took place at the meeting?

A. Well, there was a proposal that they,—the census of the meeting was that whereas the potato producer owned these potatoes until they got sold and where that the,—the potato,—that is, that these potatoes were not sold until they were sold out of weight; we got paid on an out-weight pack in 90 per cent of the cases; it was figured that we had an interest then in the sorting of them and the census of this meeting was that we should,—with having the interest in the sorting,—have a say in all negotiations that was thought to increase the cost to us, because we was going to pay the bill and through that discussion that we,—there was a committee passed, or a resolution passed, rather, to appoint a committee to draw up a resolution to that effect.

Q. Was it done?

A. It was done here, yes.

Q. Was the resolution then offered at the meeting?

A. It was, later, after they withdrew to draw up the resolution.

Q. Was it adopted? A. It was. [500]

Q. (Mr. Babcock): Mr. Wolfgang, I hand you

(Testimony of R. A. Wolfgang.)

what has been marked for identification as Board's Exhibit 55, which purports to be resolutions adopted at meeting sponsored by Bonneville County Pomona Grange in the York Grange Hall February 23, 1942; will you look through that and see if that is the resolution that you referred to?

A. I believe that is the one.

Q. Have you seen a mimeographed copy like this of it before? A. I have.

Q. Where did you see that? Where did you get it?

A. I got it from,—I don't know who it was.

[501]

Q. Do you know who had it mimeographed?

A. I don't know.

Q. Did you have it mimeographed?

A. I did not.

Q. Did you at any time receive mimeographed copies of it for your use? A. No.

Q. Did you at any time send mimeographed copies like this to local granges or to other persons?

A. I did not.

Q. Do you know whether that was done by anyone else? A. I do not.

Mr. Babcock: I offer in evidence Board's 55 for identification.

Trial Examiner Barton: I understood you to say you recognized that as the resolution that was passed at that meeting, Mr. Wolfgang?

The Witness: As near as I can remember the drift of the resolution as I heard it that night.

(Testimony of R. A. Wolfgang.)

Mr. Weston: No objection.

Trial Examiner Barton: It is admitted.

(Whereupon, document heretofore referred to marked as Board's Exhibit 55 for identification was received in evidence.) [502]

BOARD'S EXHIBIT No. 55

RESOLUTIONS ADOPTED AT A MEETING SPONSORED BY THE BONNEVILLE COUNTY POMONA GRANGE AT THE YORK GRANGE HALL FEBRUARY 23; 1942

1. Our country is at war and we are engaged in a mortal struggle with ruthless nations who are determined to destroy our way of life, and

Whereas, our enemies are working long hours with frenzy to produce war materials, food, and clothing at a cost which is only a small fraction of the time and cost necessary to produce similar items in this country, and

Whereas, the more we handicap our all-out effort during this crisis with short work-weeks, strikes, lockouts, working restrictions, time and one-half and double-time schedules, the more of our soldiers will be killed in battle. Much precious time, many million man-hours, and many of our boys' lives have been sacrificed and lost already for the above reasons.

2. Whereas, we as producers of basic essentials of food and clothing in this war stand unitedly for all-out effort by everyone and we say to labor, in-

(Testimony of R. A. Wolfgang.)

dustry, agriculture and government—lay aside your racketeering, greed, selfishness, jealousy and all other forms of inefficiency, and

Whereas, we are unitedly opposed to anything that will interfere with our government's request for increased production for our nation and our allies.

3. Whereas, we are unitedly opposed to anything that will detract from or interfere with every full measure of cooperation in buying defense stamps and bonds so badly needed at this time,

We recommend that the employers of labor in this area treat labor fairly and honestly by adopting a decent uniform minimum wage but that this wage should not be higher than that paid in other areas that are in competition with us as growers and producers, and

Whereas, all laborers who are willing to do an honest day's work should be permitted to do so without having to pay for the privilege and without having to join an organization for the right to work, and we are unalterably opposed as un-American any principle or provision that deprives or restricts the right of an employer to hire or of an employee to work.

4. Whereas, Representatives of Organized Labor have submitted contracts covering wages and working conditions to processors and handlers of farm products of the Upper Snake River Valley, and

Whereas, the said proposed contracts call for

(Testimony of R. A. Wolfgang.)

sharp increases in the cost of operation of the processing plants and agricultural agencies now handling the products of the farmers of the Upper Snake River Valley, and

Whereas, every increase in the cost of operation to the processors and handlers of farm products is immediately reflected in reduced prices paid the farmer for his products, and

Whereas, the farmers of the Upper Snake River Valley have a personal and direct financial interest in any agreements that may be made by the processors and handlers of farm products with said Labor Unions,

Now Therefore Be It Resolved, by the farmers represented at this meeting held this February 23, 1942 at the York Grange Hall in Bonneville County, Idaho, that we protest against the entering into any contract by processors or handlers of farm products with any Labor organization, without the said contract being made the subject of negotiations at which the Farmers of the Upper Snake River Valley are made parties of interest in the case, and

Be It Further Resolved, that this meeting go on record of demanding that in case any negotiations in this matter be carried to the National Labor Board for adjustment that this group of organized farmers be made an interested party to such negotiations with power and right to present witnesses, present evidence and that they be given the right

(Testimony of R. A. Wolfgang.)

to examine under oath all witnesses that may be subpoenaed to said hearings.

Upon motion duly made and seconded the above resolutions were unanimously adopted.

It was then moved and seconded that it be the sense of the meeting that all growers and producers in this area refuse to ship or send potatoes or produce to any packer or shipper who signs the contracts discussed at the meeting. After a discussion this motion was unanimously passed.

Q. (Mr. Babcock): After the adoption of the resolution, Mr. Wolfgang, what else took place at the meeting?

A. I think after the adoption of that resolution why we pretty well adjourned. While the resolution was being drawn up there was some other matters taken up. [503]

Q. Did Mr. E. Weston attend the meeting?

A. He was asked to attend the meeting, yes.

Q. And did he speak?

A. He was asked to give his legal opinion on some of the conditions of the contract.

Q. Did he do so?

A. He said some things; some things we didn't ask for.

Q. Relate the substance of what Mr. Weston said?

A. Well, the question was put to Mr. Weston, I think, whether the third party had a,—I don't

(Testimony of R. A. Wolfgang.)

know just how you word it there; a legal part in the contract, if any, and where they stood as a third party.

Trial Examiner Barton: That is where the farmers stood? [505]

The Witness: Yes, where the farmers stood, in towards it, legally. And I believe his answer was to his knowledge it was never,—he never give us an answer that would say either yes or no; he didn't know whether it had ever been tried.

Q. A lawyer-like answer?

A. Yes, you might say.

Q. What else did he have to say.

A. I,—why I wouldn't say he said anything,—he might have said quite a little, might not have said anything; that was the drift of it as I remember.

Q. Did he discuss any of the conditions the union had submitted?

A. He may have, I don't know.

Q. Was Mr. Farrel Hansen at the meeting?

A. Yes, he was.

Q. Did he speak? A. I don't think so.

Q. Was Mr. Wackerli at the meeting?

A. Yes sir.

Q. Did he speak? A. He did.

Q. And what subject did he speak of?

A. He had some figures that was compiled to represent some of them different costs of packing of potatoes under the present, past, and what was,—looked like the future. [506]

Q. By that last phrase do you mean what costs would be under the union scale; you discussed that?

A. Yes. [507]

Mr. Babcock: Mr. Examiner, I have a proposed stipulation to state with respect to L. S. Taube & Company. It is: That during the 1941-1942 season, from its Shelley and Idaho Falls warehouses it sold and shipped approximately one thousand cars of potatoes, of which in excess of ninety per cent were shipped to points outside of the state of Idaho. And if we may have a recess at this time, we have a matter we can work on, and a check to make, and we will start with a new witness right after luncheon, if that is agreeable?

Trial Examiner Barton: Very well. Is the stipulation agreeable, Mr. Weston?

Mr. Weston: Yes, Mr. Examiner. [518]

Mr. Babcock: Mr. Examiner, during the noon recess, we have checked on Board's Exhibit 5, the second page, and payroll report of L. S. Taube and Company for the week ending February 5, 1942, the names of those employees who at that time were held members of the union, had made application for membership in the union or had signed blanks designating the union as their bargaining agent. Is that correct, Mr. Weston?

Mr. Weston: Yes. [519]

* * * * *

Mr. Babcock: I will withdraw 46, 47, 48, and 50.

Trial Examiner Barton: You are withdrawing your offer as to those?

Mr. Babcock: Yes. I don't believe there,—no,

I will revoke that. I am offering those, only for the limited purpose of showing they were printed and given circulation among the employees and not proof of the facts therein. I will with,——

Trial Examiner Barton (Interposing): I am not admitting any of them as proof of the facts but simply as corroborating the other evidence. I think I make myself clear on that; only as corroborated by evidence. [526]

Mr. Babcock: I understand as to that, I am not even offering it as proof of the effect.

Trial Examiner Barton: Well I want to understand this. Are you offering 46, 47, 48, and 50?

Mr. Babcock: Yes, for that limited purpose.

Trial Examiner Barton: Well then Board's Exhibits 43 through 51 inclusive are admitted with the limitation I have already indicated, with respect to Board's Exhibits 41 and 42.

Mr. Weston: We understand that our general objection applies to each one of these?

Trial Examiner Barton: Yes, the record may show that.

(Whereupon, documents heretofore referred to marked Board's Exhibits 43 to 51 incl. for identification were received in evidence.)

BOARD'S EXHIBIT No. 47

Idaho Falls Post Register, Monday, March 23, 1942
[Penciled Note]: 23rd.

Traffic Group
Sets Meet Here
April 11

Secretary Reports
Meeting Will Discuss
'Defense Problems'

Members of the Idaho Traffic association will meet in Idaho Falls Saturday, April 11, to continue study of the container problem "and other wartime questions arising in the potato and onion industry," Carl L. DeLong, secretary of the group, announced Monday following a noon meeting at the Campbell-Covey cafe.

Mr. DeLong said that the meeting resolved to support the forty thousand pound car loading weight instead of the thirty six thousand pound weight, and urged prompt loading and unloading. He pointed out that "there is no apparent shortage of refrigerator cars in this area at present but the association is adopting measures to facilitate movement of refrigerator equipment here as well as in other areas."

The "container question is greatly improved but not taken care of as yet," J. R. Simplot, Burley, president of the association, said at Twin Falls, after a meeting there Saturday.

The shippers decided to hold the annual meeting

of the group at Sun Valley in June, and went on record as opposing "organizations of labor controlled by racketeers, and to union contracts in their present form."

Mr. Weston: Well I would like to have just one further statement mentioned, in the record, that in view of the statement by Mr. Babcock that these are admitted for the purpose of showing they were circulated among employees we object to that as there is no proof that any employee ever read the articles that were published.

Mr. Babcock: Well I want the record clear on that, I am not offering all of them for that purpose. [527]

MILO RASH

called as a witness by and on behalf of the Board, being first duly sworn was called and examined and testified as follows:

Direct Examination

By Trial Examiner Barton:

Q. State your full name, please?

A. Milo Rash.

Q. Spell the last name.

A. Rash (spelling).

Q. (Mr. Penfield): Where do you reside Mr. Rash?

A. In Ogden, Utah.

Q. What is your address?

A. I am living at the Government trailer camp

(Testimony of Milo Rash.)

out of,—south of Hill Field.

Q. What is your occupation?

A. Business representative for the Teamsters Union. Ogden area.

Q. Any particular local? A. Local 222.

Q. How long have you been employed in that capacity? [529]

A. Since the 27th of July.

Q. Were you ever employed by Idaho Potato Growers Association? A. Yes sir.

Q. Incorporated? A. Yes sir.

Q. When were you first employed by the Idaho Potato Growers Incorporated?

A. Around the 10th day of October, 1938.

Q. In what capacity?

A. I worked in a storage department, unloading trucks and potatoes into bins.

Q. How long did you continue to work in that capacity? A. Around three weeks.

Q. What happened after that?

A. Well, the harvest season was over about that time and from then on, why, I worked at various odd jobs around the house until about the first of the year.

Q. You mean around the warehouse?

A. Warehouse.

Q. And then what did you do?

A. Well, at that time I was put on the house sorting crew. Helping the house sorting crew.

Q. And how long did you continue in that capacity?

(Testimony of Milo Rash.)

A. For the rest of the season. [530]

Q. And that ended about what time?

A. The first of June.

Q. Then, as I understand your testimony, during the entire season of 1938-1939 you worked for the Idaho Potato Growers in one or the other of these capacities? A. Yes sir.

Q. Did you return for the company the following season?

A. No, I didn't work for them the following season.

Q. That would be the season of 1939-1940?

A. Yes sir.

Q. Did you ever return to work for the company?

A. I returned for the season around October the 10th, 1941, no,—1940.

Q. Was the 1939-1940 season when you did not work, is that correct? A. Yes.

Q. So this would be the,—

A. 1940-1941 season.

Q. I see. And then in what capacity did you return to work?

A. Well, my first job when I returned that year was on a night crew that they had working nights sorting in the warehouse.

Q. And will you describe the employment that you had with the company during that season?

A. Well we,—I helped load cars and swamped on the side and with that crew, about a week. [531]

Q. What do you mean by "swamping"?

(Testimony of Milo Rash.)

A. Well, that is taking the two's off the side of the sorter and sewing them up and trucking them away. And I worked on that about a week and the night crew was discontinued and they put me on a country crew. Then I worked with a different country crew about a month, out in the farmers cellars.

Q. What did you do with the country crew?

A. I sorted and sometimes jigged and sacked and swamped and tried to bag a few times; scooped.

Q. After that what did you do?

A. After that I commenced working with the warehouse crew. I was swamping away, weighing little bags and jigging, until about the last two or three months and then I loaded cars. Kept track of the time and the lots of the farmers' potatoes; how long it took to sort each load and how many of the different grades that we took off during this time.

Q. And how long did you continue in that then?

A. I continued until the end of that season.

Q. When did that,—when that season ended do you recall any conversation with Mr. Farrel Hansen?

A. Yes sir. When the season ended I was going to Oklahoma and the girl that give me my check there told me that Mr. Hansen wanted to talk to me. I went into his office and he thanked me for the work I had done that season and told me to be sure and be back the next. That he would need

(Testimony of Milo Rash.)

me worse than [532] next season than he had before we finished.

Q. Did,—did you return the following season?

A. Yes sir.

Q. At what time?

A. I got back in Idaho in August and went to work on the 3rd of September.

Q. And in what capacity?

A. Well the first couple of days I loaded cars again, but I had been told that I was to have a sack job, taking care of,—

Q. (Interposing) Who told you that?

A. Mr. Foreman.

Q. He is the head of the warehouse, the shed?

A. Yes.

Q. (Mr. Penfield) You referred to a sack job. Will you describe for us in some detail what you mean or of what this job consisted?

A. I was supposed to have charge of all branded bags and all field bags. Checking the field bags out to the country crews to be filled and then when they come in and were emptied I was to count them and check them back in and give credit to the foreman for those returned.

Q. What is the distinction between a branded bag and a field [533] bag.

A. A branded bag is a bag that they put the potatoes in after the grade has been made on them and is ready to be shipped and a field bag is just a dump bag, it is sent out in the country to be

(Testimony of Milo Rash.)

filled and brought back into the warehouse and re-run made.

Q. Now in some instances do the country crews take branded bags? A. Yes.

Q. And in other instances are the branded bags used in the warehouse? A. Yes.

Q. Did you have charge of these bags wherever they were used? A. Yes.

Q. Will you describe for us just how you did this work, with reference to where the bags were stored and how you checked them in and out and that sort of thing?

A. Well, they had had quite a bit of trouble losing bags the year before, the field bags; so I insisted they build a room and put a lock on it so I could keep a better track on them than they had the year before, and when a country crew went out into the country to fill these bags, I would count them out to them and when they came in filled they were dumped and tagged on the floor and after they were dumped and tagged they [534] were put up on the piles of sacks and tagged and I counted them and put them back in the bag room and gave them credit for that many.

Q. These were charged to the foreman of the country crew?

A. Yes sir, they were charged to the foreman of the crew.

Q. You kept records did you of these bags?

A. Yes sir.

(Testimony of Milo Rash.)

Q. Was the same situation true with respect to the branded bags?

A. Well, there wasn't such a good record kept of those. The house crew, whenever they might decide,—or they would get an order to run a carload, they might go out and get them themselves and bring them in.

Q. Were the branded bags and country bags kept in this same locked room that you speak of?

A. No sir. The locked room for the field bags was in the basement and the branded bags was stored upstairs in a new part of the building they had just built that year before I think. There was no lock and key on the branded bags.

Q. Mr. Rash, did your duties in connection with the handling of these bags take up your entire time?

A. Well no, no. There was some time that I didn't,—wasn't taking care of sacks.

Q. Now, did you have any other duties at this time?

A. Well, when I wasn't busy on them I would generally help [535] around the warehouse in a different capacity.

Q. Well what jobs in particular did you do?

A. Well, sometimes I would help the carloader, I would load cars for him for a while and off-times I would tie little bags and I helped back Christmas boxes of potatoes to be shipped all over the country and they had a special hotel, restaurant

(Testimony of Milo Rash.)

brand of baker's potatoes that I helped to pack.

Q. Was that a special type of pack?

A. Yes sir.

Q. Did anyone in particular supervise your work?

A. Well, it was more or less turned over to me when I was working on the sack job. But on this potato special pack and this other work, why, Lester Long had charge of this special pack potatoes and on the other Fred Foreman was over all that.

Q. It's Foreman the foreman; may be a little confusing. Did your work require the assistance of anyone else, I mean, in connection with the sack work?

A. Well it didn't require the assistance of anyone else; off-times I would, when Mr. Long would get behind or get a rush order for these special pack potatoes I would help him on this and then in turn when he got caught up he would help me. Unless we was taking an inventory, it was my job to take inventory of these bags and sometime,—most of the time Mr. Long would help me on that.

Q. Now Mr. Rash, when did your employment with the Association [536] terminate?

A. On February the 24th.

Q. Then, from the opening of the 1938-1939 season until that date with the exception of the 1939-1940 season, you worked continuously for the Association during the potato season, is that correct?

A. Yes sir.

Q. I believe you have testified that you per-

(Testimony of Milo Rash.)

formed quite a number of jobs during that period, including a period in which you worked on the country crew. Could you inform us what type of machinery was used in the warehouse and country; or could you describe for us just this machinery is that you use in the warehouse?

A. Well, a warehouse sorter is about twenty foot or maybe 15 foot long,—16. It has a continuous lathe belt that is run from a motor underneath that has an automobile transmission to it. It has baggers on the front end of it and on the side and a hopper at the back of it that brings the potatoes up on to the sorter. It has a piece of strip iron on each side down the,—extends about four to five inches into which the number two's go on one side of the sorter and the culls on the other side, or they sometimes pick our special potatoes off of the side on these. And they have a washer that empties into this hopper to wash the potatoes and brush them. And then they have a conveyor that goes from this washer to the basement. [537]

Q. Are the washed potatoes carried on this conveyor?

A. They most of the time they dump them in a hopper in the basement. They are carried upstairs into the washer and the washer revolves, it is built like a barrel, open at both ends, and it revolves and water is sprayed on them and then the potatoes roll out of there on to another conveyor and carried up to the sorters.

Q. And that is all a mechanical process from

(Testimony of Milo Rash.)

the time they are put in the hopper first before going into the sorter? A. Yes sir.

Q. Now, when they leave the sorter, what is the procedure,—withdraw that “procedure”; what is the work done by the employees on the sorting?

[538]

A. Well, they generally have about four men working on this sorter where the potatoes empty on to the sorter. It's generally,—they generally start picking the culls out there.

Q. Now, are there men on either side of the sorter?

A. Yes, offset just a little, they would be offset just a little. The first two will get all the culls and make as many number two's as they possibly can. The third man then will make the balance of the two's and catch what culls he can, what is left; whatever culls there are left.

Q. Now, how are the culls and two's disposed of by these sorters?

A. Well, they are put in the different troughs that conveys them off into a different space. The number one's come off the front end and the two's and culls into different troughs.

Q. And that is all on the side of your sorters?

A. Yes, on this warehouse sorter the cull trough is generally in the middle of the sorter, and it carries them down the chute into the basement.

Q. What happens to them when they get in the basement?

A. They have a man taking off the culls, off the

(Testimony of Milo Rash.)

cull chute down there and he takes them off and,——

Q. Are they taken off in sacks down there?

A. Yes sir.

Q. And is the same thing true with respect to the two's? [539]

A. Well, they come off the side upstairs and they will be taken off, sacked, weighed and sewed up and taken off to the side and taken away; tagged.

Q. What is the situation with respect to the one's?

A. Well, they are generally sorted and loaded into cars.

Q. Now, what degree of skill is required by these workers on the sorter?

A. Well I would say that there is just one man in the basement on the dumping end of it that requires any skill there and that is sometimes if you put them in there too fast you swamp the sorting crew. You have got to put them in just so. So many that they can take care of, just as many as possible, but that they can care for on their end of it or you would have *to stopping* the sorter. You can just take and dump a sack in there and it is swamped. And after you get upstairs there is a whole lot of skilled jobs; packing out, picking a cull out, picking out the first ones, and after that it doesn't go,—well, it does require a little more time around a potato house to judge the off-type two from a one.

(Testimony of Milo Rash.)

Q. Is there one man that stands near the front end of this moving belt on the sorter?

A. Yes.

Q. What is his position? A. He is grader.

Q. And does his job require any greater degree of skill than [540] that of the other workers?

A. Yes. A man that makes the grade on potatoes is generally, he generally got from two to three or four years of experience and they generally start out picking culls and work up to hand grader.

Q. Is he the final person to pass on the grade of potatoes before they go into the sack?

A. Before they go to the inspector, before they get into the sack, yes.

Q. Now, what about the other jobs, such as the carloader; is any particular skill or knowledge required of a carloader?

A. Well, at the particular house where I worked why our job was to keep the different members' names that was on the crew; the different farmers' names, that,—the spuds that we run; who they belonged to. How many number one's we got off of the lot; how many number two's; how many specials; how many culls; and how long it took to run them.

Q. That was in addition to actually physically loading the cars?

A. Yes sir. And make out the car report when you get the car loaded.

Q. Is there any degree of skill required in packing these cars, I mean, in loading the cars and packing them?

(Testimony of Milo Rash.)

A. Well, the cars all have to be loaded in a certain way to let the air circulate in amongst them.

[541]

Q. Are the loaded cars subject to inspection?

A. Yes sir.

Q. By whom?

A. By the Government,—State,—Federal inspector. And by anybody that is interested; foreman.

Q. Now Mr. Rash, you also worked on the country crew. There has been some testimony here that sorters are taken out by the country crews to the farmers cellars, is that correct? A. Yes sir.

Q. Now, do these sorters differ in any particular from the sorters that you described in the warehouse, the machines, I mean?

A. Only that they are a little bit smaller and they are [542] movable; the ones in the warehouses are stationary. Their work is,—working of them is the same.

Q. The manner in which the men do their work in connection with these sorters is also similarly done?

A. Yes. It is all the same, except that in the cellars why you scoop potatoes into the hoppers in the warehouses you dump them into the hopper out of sacks.

Q. (Mr. Penfield) Then the degree of skill required by the workers in the country crews, is it substantially the same as that by the warehouse crew? A. Practically the same.

(Testimony of Milo Rash.)

Q. Except there are some additional jobs in the warehouse, is that correct? A. Yes. [543]

Trial Examiner Barton: The same employees that work in the warehouse also go out to the country sometimes, do they?

The Witness: Yes sir.

Q. (Mr. Penfield) Are there occasions that you recall where farm hands will work with the country crews?

A. Yes, on one or two occasions I have been out where the farm crew worked,—farm hands worked with the crews.

Q. And what jobs will they usually perform?

A. Scoop. Scoop them into the hopper.

Q. Is the scooping job the least skilled of all the jobs?

A. All that requires is a strong back.

Q. (Mr. Penfield) Mr. Rash, were you ever a member of Local 983 of the Teamsters?

A. Yes sir.

Q. Will you tell us when you first heard of this organization [544] and in what manner you heard it?

A. It was on about the 15th or 14th of January 1942.

Q. And in what manner did you hear of the Union?

A. Mr. Ray Hansen came over to the Potato Growers Association where I worked and introduced himself and told me that he was having an organization meeting on a, the 16th, and that he

(Testimony of Milo Rash.)

would like for me and all the rest of them that were,—could and would,—to attend, the organization meeting.

Q. And following this conversation with Mr. Hansen,—strike that. Prior to this meeting did you speak to any employees about it?

A. Yes. I told them that I had talked to Mr. Hansen and that I was going up and I felt that they all ought to go up.

Q. Did you attend the meeting of January 16th? A. Yes sir.

Q. Can you tell us about how many employees from the Potato Growers Association were there?

A. I would say somewhere in the neighborhood of 30 to 35.

Q. Did you sign up with the union at this time?

A. Yes sir.

Q. Was this January 16th meeting a regular organizational meeting? A. Yes sir.

Q. Did you attend similar meetings thereafter?

A. Yes, I attended all the meetings,—all the organizational [545] meetings that they held here up until the time I left and I also attended two meetings in Rigby and one in Shelley.

Q. How did you come to attend these meetings in Rigby and Shelley?

A. I attended in Shelley with Mr. Owen and Mr. Ray Hansen. They asked me if I wanted to go along and I told them “yes”, I would be glad to to along and help them filling out their applications and designation slips, helping the workers

(Testimony of Milo Rash.)

fill them out and then I went to Rigby with Ray Hansen for the same purpose and at that meeting we made an appointment for the meeting for the following Thursday and I went over to the hotel to go to this meeting and Mr. Hansen had been called out of town and Mr. Owen was there and he was sick and unable to go and so he asked me if I would go up and I told him "yes" and I took his automobile and application blanks and authorization slips and went up to Rigby and conducted the meeting myself in the basement of the court house.

Q. You testified the first meeting you attended was January 16th. Now, with respect to the subsequent organization meetings in Idaho Falls, Shelley, and Rigby, can you tell, give us the period following January 16th that those covered?

A. Well, they were being held about,—we had meetings about twice a week.

Q. From?

A. From the 16th of January up until the time that I left here, [546] or up until around the first of March some time.

Q. Till around the first of March?

A. Somewhere in there.

Q. Do you recall with respect to this Rigby meeting that you handled yourself whether you were still in the employ of the Potato Growers Association? A. Yes sir.

Trial Examiner Barton: How long was that before your employment terminated?

(Testimony of Milo Rash.)

The Witness: To the best of my knowledge it was about two weeks.

Q. (Mr. Penfield) Did you ever serve on any committees for the union?

A: Yes sir. I was elected by the workers,—the members of the union, to be on the committee, contract committee, to draw up the contract to present to the dealers and I was also elected chairman of a grievance committee that was elected at Idaho Falls Potato Growers Association.

Q. Well was that a committee of the union?

A. No, that was not a union committee.

Q. So the only committee for the union was this contract committee that you speak of?

A. Contract committee, yes sir.

Q. At these various meetings that you attended did you render any assistance in connection with the application blanks or designation blanks? [547]

A. Yes sir. I would help explain the application blanks to the fellows as they came up to sign up and help them and help them authorize their signature,—I would vouch for their signature.

Q. Now, following the January 16th meeting when you signed with the union did you ever have a conversation with any supervisory employees at the potato growers? A. Yes sir.

Q. And how soon thereafter?

A. Well, I signed up on the 16th on Friday and I was,—it was on about the following Tuesday, Mr. Fred Foreman at the Potato Growers called me into his little office he has got there and asked me

(Testimony of Milo Rash.)

what all this union business was about. He says there has been several people of the different dealers call up here and say that you are the instigator of the whole business and I told him, "Fine, maybe some day they would elect me secretary."

Q. Did that conclude this particular conversation?
A. At that particular time, yes.

Q. Did he ever have occasion to bring up the subject again?

A. Several,—several occasions he would pass me and call to me, "Well, secretary; how is the secretary today; how is the secretary doing," like that.

Q. Did that occur on a number of different occasions?
A. Yes.

Q. You can't recall the exact time? [548]

A. No.

Q. Following the January 16th meeting do you recall hearing of another meeting of employees which was to be held?
A. Yes sir.

Q. And just what did you hear?

A. Well, it was just right at noon-time, and we generally got our checks at noon,—

Q. Well now about when was this relatively to January the 16th?

A. It was on the 24th of January.

Q. What day of the week?

A. It was on a Saturday morning, just before noon, I came up to get my check; we generally got them just before noon; and there was several of the boys there and they were talking about attending a meeting in the City Hall building, so I asked Mr.

(Testimony of Milo Rash.)

Foreman if I was to go to this meeting and he said, "Yes, I want you to go." And so I told him, "All right, I would go."

Q. Was anything said about your taking time off for the afternoon to go?

A. I asked him if I would be docked for the time we spent over there and he said we would be paid for all the time we spent until we got back to the warehouse.

Q. And did you attend that meeting?

A. Yes sir.

Q. And who was with you? [549]

A. There was as I recall, there was four of them, of the men working there at the Potato Growers.

Q. Do you recall their names?

A. There was Henry Norrell and Swede Norrell, and Herman Handy and Pete Schell.

Q. About what time did this meeting take place?

A. It was around, oh, I would say it was around 1:15; it was supposed to be for 1:00, but it was about 1:15 or 1:20 before it took up.

Q. And about how many persons were present?

A. Somewhere in the neighborhood of 60, 65.

Q. And of these about how many were employees? A. 50 to 55.

Q. And can you tell us who the other persons were?

A. Well, I can name those that I recognized.

Q. Well who presided at the meeting, can you tell us that? A. George Hersley.

Q. And who is he?

(Testimony of Milo Rash.)

A. Well I understand he is a farmer in this community.

Q. Did you know him to be a farmer at that time? A. Yes sir.

Q. Were you present yesterday in the court room when Mr. Ray Hansen was testifying?

A. Yes sir.

Q. At the particular time when he was testifying with respect to this meeting? [550]

A. Yes sir.

Q. Do you recall his testimony?

A. Yes sir.

Q. Did he state the events which transpired at this meeting, to the best of your recollection?

A. He covered them mighty good, just as I recall them.

Q. Did you have anything to add to his testimony in that respect?

A. No; I don't think there is anything to add to his testimony.

Q. Following this February twenty-fourth meeting do you recall a meeting of employees of the association? A. Yes sir.

Q. And when did this meeting take place?

A. It was along about the middle of February, the tenth or twelfth,—somewhere around in February.

Trial Examiner Barton: This word, "Association," may cause confusion at times. You see we have the Traffic Association, and then we have the whole name of the Idaho Falls Potato Growers.

(Testimony of Milo Rash.)

Mr. Penfield: I think that is true, Mr. Examiner. I will try to refer to the respondent Potato Growers. I think that is the way they are named in the complaint, and in that way it won't cause confusion.

Trial Examiner Barton: All right. [551]

Mr. Penfield: I think in every instance as far as this witness is concerned wherever we have referred to the word "Association," it has referred to Respondent Potato Growers.

Trial Examiner Barton: Is that the way you have understood the questions?

A. Yes, sir.

Trial Examiner Barton: All right.

Mr. Penfield: I wonder if you would read that last answer, Mr. Reporter?

(Last answer read.)

Q. (By Mr. Penfield:) And will you tell us who called this meeting?

A. It was called by Mr. Farrel Hansen.

Q. How was the announcement made?

A. Well, he told,—as I got it, he told the foreman and the foreman told us.

Q. And where was this meeting held?

A. It was held in the warehouse of the Potato Growers in Idaho Falls.

Q. And were all of the employees present?

A. All the employees of Idaho Falls and Shelley.

Q. Was Mr. Forman there?

A. Yes, sir. [552]

(Testimony of Milo Rash.)

Q. (By Mr. Penfield:) Just relate, as best you can, just what Mr. Hansen stated, Mr. Rash.

A. He said that he figured that if we would form our own union and take up our own problems through a grievance committee to deal with them and with the board of directors, that he thought we could get lots further lots quicker than belonging to the Teamsters.

Q. Did any of the employees make any reply to this suggestion?

A. I told him that I did not think that I thought we would have the power nor the support in an independent union that we would have if we belonged to an International organization. [553]

Q. And what did he say to that?

A. He said that he did not think we would need it; that if we was to take our problems up with him and the board of directors that he thought we could get whatever we wanted.

Q. Did he make any other remark about that that you recall?

A. That was the general,—I don't recall any other thing; we talked both pro and con for a while, but that was the substance of it.

Q. Did you participate actively in this discussion? A. Yes, sir.

Q. Do you recall anything being said about an election?

A. Yes. He said that he thought that we should elect a grievance committee to take up these problems of the workers, and some of them asked him

(Testimony of Milo Rash.)

how to go about it, and he told us that we could nominate five men, and vote for three of them. The one that would get the most votes would automatically be chairman of this committee.

Q. Were his suggestions along these lines followed?

A. Yes, sir. They passed out little pieces,—they nominated the five men and passed out little pieces of paper to vote for them.

Q. Did Mr. Hansen and Mr. Forman remain at the meeting during this election procedure?

A. Yes, sir.

Q. Who was elected to the grievance committee? [554]

A. The only ones that I can recall that was nominated was the ones that was elected, and that was Lloyd Jergensen, Alvin Steers and myself.

Trial Examiner Barton: Are those names on the payroll lists?

Mr. Penfield: I am not certain, Mr. Examiner.

Trial Examiner Barton: All right. Lloyd Jergensen, Alvin Steers, and yourself?

A. And myself.

Q. (By Mr. Penfield) And who was the chairman?

A. I was elected chairman by majority vote.

Q. That is, by virtue of having *receiving* the most votes? A. Yes, sir.

Q. Did anything else occur at this meeting?

A. Well, during the time that they was counting the votes they had coffee and donuts served, and

(Testimony of Milo Rash.)

everybody got to drinking coffee and donuts and discussing amongst themselves, and that practically ended the meeting.

Q. Did the members of the grievance committee meet at that time? A. No, sir.

Q. Do you recall, Mr. Rash, whether or not, the Teamsters Union had presented a contract to the management of the respondent Potato Growers at this time? A. Yes, they had. [555]

Q. Had one already been presented?

A. Yes.

Q. You are sure of that?

A. Yes. I believe it arrived the day of that meeting. I know it was there.

Q. You do? A. Yes.

Q. Was it mentioned at that meeting?

A. Not at that meeting. Mr. Forman had mentioned it to me the afternoon of this meeting.

Q. Of the same day as the meeting?

A. Yes.

Q. You have testified that your employment terminated on the twenty-fourth day of February, I believe. Is that correct? A. Yes, sir.

Q. Will you tell us just what occurred on this day

A. It was around six o'clock that evening. I was in the sack room counting in some sacks to give the foreman credit for, and Mr. Forman came into the sack room and he says, "Well, I guess that is all of it." I asked him what he meant, and he says, "They have decided to discontinue your job." He

(Testimony of Milo Rash.)

says, "The dumpers will put the sacks into the sack room and the truck drivers will take them out to the country crews." I told him that I thought that would cost [556] them more money than it would to keep a man on the sack job, and he said that was what they had told him, that they were discontinuing my job.

Q. Did you receive your check at that time?

A. He handed me my check at that time.

Q. Was this the end of a regular payroll period?

A. No, sir; it was on a Tuesday night. Our regular payroll is on a Saturday.

Q. Did Mr. Forman say anything about another job?

A. As he started to leave and to go upstairs, he said, "It may be that I could go out with the country crew."

Q. What did you say in response to that?

A. I told him that I couldn't scoop these potatoes. I had tried scooping them and I couldn't do it, and that I knew that was the kind of job I would get if I was to go out with a country crew.

Q. Did he offer you any definite job?

A. No, sir.

Q. Had you noticed any slackening of the work at about the time you were laid off?

A. Well, there was a little bit of slack during that time. They were, I think, pretty much up in the air about the Union at that time. On one occasion they sent us all home; told us there would

(Testimony of Milo Rash.)

be no other work to do until they notified us. [557]

Q. For how long were you off at that time?

A. At that time, I believe that was on a Friday, and I was off until Monday.

Q. Were there any jobs that you,—strike that. Could you perform most of the jobs in the warehouse?

A. On different occasions I have worked on all the jobs that there is to be done in the warehouse, except head grading.

Q. Has your work with the sacks ever been criticized? A. No, sir.

Q. Had your work at any of these other jobs ever been criticized? A. No, sir.

Q. Had anyone ever indicated to you that you were,—Strike that. Had you ever been complimented on your work with the sacks?

A. I was told by Miss Gillis in the office who takes care of the inventories and keeps records on the books, that we were doing much better on the field bags that season than they had before. They had not lost half as many.

Q. During the time that you worked,—Strike that. Had you ever been laid off before the end of the season on any of the prior seasons during which you worked? A. No, sir.

Q. Was someone employed in a,—on a sack job during the [558] other years you worked for the company? A. Yes, sir.

Q. Do you know whether during those years the

(Testimony of Milo Rash.)

person holding that job was laid off before the end of the season? A. No, they——

Mr. Weston (interposing) We object to that as being immaterial.

Trial Examiner Barton: Well, if the witness knows, I will let him state.

A. No; they were not.

Q. You know they were not? A. Yes, sir.

Q. Following February the twenty-fourth did you take action with respect to reinstatement to your job? A. Yes, sir.

Q. And what action did you take?

A. I told Mr. Ray Hansen that,—about my being fired. And he called Farrel Hansen and Farrel Hansen said that I was not fired, it was a temporary lay-off, and for me to come over and talk to him. I went over to the potato growers association on the following Monday, and he was not there. They told me that he was at the Bonneville Hotel. So I went up to the Bonneville Hotel, and he was attending a Traffic Association meeting on this Monday. I sat down out in the lobby and waited until he came out [559] and then I talked to him about my job. I told him that Ray Hansen had told me that he wanted to talk to me about it, and he told me that he didn't fire me for my union activities, although he figured that we were being misled by the union, and I told him that I was not offered a job in the warehouse. If I had of been I would have took it. And he said that he would take it up with the foreman and the board of di-

(Testimony of Milo Rash.)

rectors and let me know later what could be done about it.

Q. Did he offer you a job anywhere at that time? A. No, sir.

Q. Do you recall any meetings of the employees of the potato growers following your discharge?

A. Yes, sir.

Q. And about when?

A. Well, I don't know the exact date. I think it was in the latter part of February. There was a,—Mr. Farrel Hansen called a meeting of the employees on a Sunday. The day before this Sunday, why, they had all threatened to walk out, if he let Ed. O'Neil's crew come in and use one of the house sorter to sort potatoes. They figured that Ed. O'Neil,——

Mr. Weston: (Interposing) Just a moment. We are going to object to this kind of testimony. I would like to ask a question for a foundation to other objection. [560]

Mr. Rash, *where*, were you there at this meeting?

A. Yes, sir.

Mr. Weston: I mean, with reference to Mr. O'Neil's crew? A. I attended the meeting.

Mr. Penfield: Mr. Weston, I think your objection is probably well taken.

Trial Examiner Barton: I think it is a good objection to some of the testimony.

Mr. Penfield: Yes.

Q. (By Mr. Penfield) If you will confine your remarks, just state what occurred at this meeting

(Testimony of Milo Rash.)

while you were there, what was said to you, and what happened, why, then I think that will meet the objection.

A. Well, at this meeting, why, it was discussed whether they would let down and let Ed. O'Neil's crew come in and sort potatoes on one of the sorters of the warehouse.

Q. Was this publicly known there was a meeting held? A. Yes, sir.

Trial Examiner Barton: On a Sunday near the end of February?

A. On a Sunday.

Trial Examiner Barton: On a Sunday near the end of February?

A. Yes. At this meeting they decided they would not let [561] a crew come in, and let them come in and use one of the house sorters.

Q. This was discussed between Mr. Hansen and the employees? A. Yes.

Trial Examiner Barton: Was there a vote taken? A. Yes.

Q. Did you have any,—did you participate in this meeting in any way?

A. I heard of the meeting and called Mr. Farrel Hansen on the telephone. I told him,—asked him if he thought I should be there as I was still chairman of this grievance committee, and I figured I should be there, and he said there was not any use of me coming over, that if I wanted to come, why, all right, to come on over, and so, after it was decided upon that they would not let this crew

(Testimony of Milo Rash.)

use the sorter I asked Mr. Farrel Hansen if I was fired. If I was not, I was ready to go back to work, and if I was, I thought they should elect a new chairman of this grievance committee, and he told me he figured I had better look for me another job.

Trial Examiner Barton: Now, was this conversation with Mr. Hansen in the presence of the entire group, or apart from the entire group?

A. It was in the presence of the entire group.
[562]

Q. (By Mr. Penfield) Mr. Rash, was anyone else laid off at the time you were?

A. No, sir; not to my knowledge.

Q. Do you know of any employees that continued to work in the warehouse after you did, who had worked for the company for a shorter period of time than you had?

A. Yes, sir.

Q. And who were they?

A. There was Max Goodman,—

Q. What did he do? A. He sewed sacks.

Q. Could you do that job? A. Yes, sir.

Q. Who else? A. Victor Mussman.

Q. And what did he do?

A. He worked on these special pack potatoes, and I understood a couple of days after I left,—the first couple of days after I left, he handled the sacks.

Q. Could you do the work on the special packs?

A. Yes, sir.

Q. Are there any others?

(Testimony of Milo Rash.)

A. There was three swampers, and possibly four men that worked in the basement,—I don't recall their names. [564]

Q. Do you recall the names of any of them?

A. No; I can't recall their names. It was their first year, and I was kept pretty busy. I don't know their names.

Q. You know, do you, that these persons to whom you have referred had worked for the company a shorter time than you had?

A. Yes, sir.

Mr. Penfield: I believe that is all.

Cross Examination

Q. (By Mr. Weston:) Did you ever discuss with Farrel Hansen the prospects of having him lay off one of those other men and put you on? Did you ever ask him to do that?

A. I told him I figured I should be offered a job in the warehouse, that there were several men there that had worked in the warehouse for a shorter length of time than I had.

Q. Did you feel when your job was eliminated that he should lay off somebody else and give you that man's job? Is that what you wanted him to do?

A. I figured he could work me in there some place, yes.

Q. Even if it meant discharging somebody else,—is that what you wanted him to do?

A. I don't feel like it was necessary to discharge anybody. [565]

(Testimony of Milo Rash.)

Q. If it were necessary, did you want him to do that?

A. I wouldn't ask nobody to do that.

Q. You wouldn't. [566]

Q. Now, I believe you testified you have done practically every kind of a job over there?

A. Practically everything there is to be done there.

Q. Except scooping?

A. Except head grader-man.

Q. Then you can scoop, can you?

A. No, sir.

Q. You can't do that?

A. No; not and hold up to it.

Q. Is that a particularly heavy job? [568]

A. It is. It is bending over all the time.

Q. That sack job was there when you first went there in 1941? A. In 1941?

Q. Yes. A. Yes.

Q. You didn't go right on that job at first? It was created for you, wasn't it?

A. They got so far behind,—there was nobody taking care of it, and when I did go on it I had all the work to do back for two days. I had loaded cars. [569]

Q. So you took it over from there and straightened it up, is that the idea? A. Yes, sir.

Q. How about the first year you worked there,—there wasn't a sack man, was there?

A. Yes, sir.

Q. Who was the sack man?

(Testimony of Milo Rash.)

A. Ronald Goodman.

Q. Was that for the whole season?

A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. That is the same job you had?

A. Yes, sir; only he did weigh in trucks at that time.

Q. He also weighed in trucks?

A. Weighed in a few potatoes during the harvest season. He worked in the scale house, too.

[570]

Q. Now, after this particular job you were performing was [571] eliminated, you testified that you had a conversation with Mr. Forman, the foreman, in which he suggested that you could go on a country crew?

A. He said maybe I could go out with a country crew.

Q. And you then stated you knew what you would get on a country crew would be a scooping job? A. That is right.

Q. And you didn't want that?

A. That is right.

Q. So you were determined at that time you wouldn't go on a country crew, weren't you?

A. No, sir.

Q. You told them you wouldn't?

A. I wouldn't scoop.

Q. You didn't know what you were going to get on that job, did you?

(Testimony of Milo Rash.)

A. From the looks of things I knew what I would get.

Q. That was just your guess, wasn't it?

A. I pretty well knew what I would get.

Q. How did you know?

A. From the actions, the way things had been going.

Q. Did anyone tell you they were going to put you on a scoop job? A. No, sir.

Q. You just guessed they would? [572]

A. I well knew what I would get.

Q. Any way, you told the foreman you weren't interested in a farm crew job?

A. In a scooping job.

Q. Now, at the meeting where you called Mr. Hansen, Farrel [573] Hansen, and suggested that as long as you were on the grievance committee you wondered if you could come, and he said you could if you wanted to, that was on what date, about? The latter part of February?

A. I believe it was in the first part of March,— I am not sure. The latter part of February or the first part of March.

A. At this meeting most of the employees were there, were they not? A. Yes, sir.

Q. And didn't this question come up right there in that meeting of your employment with the respondent Idaho Potato Growers?

A. Yes, sir.

Q. And isn't it a fact that Mr. Hansen said he was perfectly willing to have you come back and fit into

(Testimony of Milo Rash.)

any job that was available, providing you were willing to come back, or words to that effect?

A. No, sir.

Q. Didn't he make some statement about an available job for you? A. No, sir.

Q. *Didn't he make some statement about an available job for you?* A. *No, sir. [574]*

Q. Didn't he make some statement at that time about cutting down on expenses and business was slacking off a little at that particular time, that they were absorbing several jobs into one, or words to that effect?

A. Something like that; yes, sir.

Q. Isn't it a fact, Milo, at that time you said, "Well, I feel sorry for you, Mr. Hansen. In fact, I feel so sorry I believe I will pass the hat." Didn't you make that statement? A. Yes.

Q. Isn't it a fact that after you made that rather sarcastic statement Mr. Hansen said, "Well, if that is the way you feel about it and if that is your attitude, I don't think you can fit in here," or something like that? A. No, sir.

Q. It was immediately after that statement he told you what you said?

A. That I had better look for another job. [575]

Q. You remember this conversation over in the Bonneville Hotel you testified to, with Mr. Farrel Hansen? A. Yes, sir.

Q. You asked him in substance, about, "How do I stand," or something like that. You wanted

(Testimony of Milo Rash.)

to know how you stood on your proposition with him?

A. About what they had done about putting me back to work?

Q. Yes. A. Yes, sir. [578]

Q. And you recall he told you that if you would take the job they had for you over there you could go to work "tomorrow morning?"

A. No, sir.

Q. You don't remember him saying that?

A. No, sir.

Q. You deny that he did say that?

A. Yes, sir.

Q. What did he say at that time?

A. He told me he thought we were being misled by the Union, and so far as my job was concerned he would have to take it up with Fred Forman and the Board of Directors and see what could be done.

Q. And that is your understanding of what he said about your job? A. That is all.

Q. There isn't any doubt in your mind, is there, Milo, but what this job you were doing was discontinued the day you terminated your employment?

A. You say it was discontinued?

Q. Yes, as an independent job.

A. It wasn't discontinued.

Q. Who took the job after you left?

A. Vic Mussman for about two days, and then Lester Long.

(Testimony of Milo Rash.)

Q. Isn't it a fact it is now divided among several of them? [579]

A. Not to my understanding.

Q. Was anyone hired for that job after you left?

A. There was a man put on the crew that Lester Long was working on after he took the sack job, to my best recollection.

Q. Where did you get that information?

A. From Lester Long.

Trial Examiner Barton: Do you know the name of the employee that was put on the crew?

A. My understanding was it was Ronald Goodman.

Q. Wasn't Ronald working there at the time you left?

A. At odd jobs around there.

Q. What I am trying to find out: Was there any new employee put on over there that you know of, to take your job?

A. A new employee?

Q. Yes.

A. They could have been hiring new employees,——

Q. I am not asking you that. I want to know if you know if any was put on?

A. I didn't have any occasion to be there. I wasn't watching who was hired and who was fired.

Q. So you really don't know?

A. As to a new man, no, I don't really know.

[580]

(Testimony of Milo Rash.)

Redirect Examination

Q. (By Mr. Penfield): Mr. Rash, who held the sack job before you? A. Joe Schofield.

Q. Was that in the year preceding?

A. The year preceding, and the year before that.

Q. And who held the job the first season you were there? A. Ronald Goodman.

Q. Have you,—during the period in which you were working on a country crew, did you ever work at scooping? A. I have tried it; yes.

Q. Were you able to do it?

A. No, sir; I wasn't able to do it.

Q. Nor, Mr. Rash, did,—on the day that your employment terminated, did Mr. Forman offer you any type of job in the country or in the warehouse?

A. No, sir.

Q. Did Mr. Forman or Mr. Farrel Hansen at any later date offer you a job in the country or warehouse? A. No, sir.

Q. I believe on cross examination you gave some testimony with respect to the rates of pay. What was your rate of pay on the sack job as compared with other employees in the warehouse? [581]

A. I was getting the highest rate of pay on the sack job that they paid. It compared with the head grader-man.

Q. The head grader-man? A. Yes, sir.

Q. And how did it compare with the rates of pay for workers on country jobs?

A. It compared with the head grader-man on

(Testimony of Milo Rash.)

the country crews, but it was five cents a hour more than the rest of them were getting.

Q. Is the head grader-man on the country crew the crew foreman? A. Yes, sir.

Q. Then it was,—were all of the rest of the country crew paid the same rate?

A. To my knowledge they were. They were getting fifty-five cents an hour.

Q. And your rate of pay was five cents more than that? A. Yes, sir.

Q. Now at this meeting in the latter part of February or the early part of March, this meeting of the employees, I believe you stated Mr. Farrel Hansen made some mention of putting you on a job, if available? Did he state any jobs were available at that time?

A. I don't remember him saying anything at all about a job being available, or anything about a job at that meet- [582] ing to me.

Q. You don't recall? A. No, sir. [583]

JACK CORMI HENDRICKSEN,

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Barton: State your full name, please. A. Jack Cormi Hendricksen.

Q. (By Mr. Penfield): Where do you reside, Mr. Hendricksen?

(Testimony of Jack Cormi Hendricksen.)

A. 271 Basalt Street in Idaho Falls.

Q. What is your occupation at the present time?

A. I am operating a lunch stand, the Apple Pie Inn.

Trial Examiner Barton: Don't be afraid to speak out so everybody can hear you, Mr. Hendricksen.

Q. Were you ever employed by L. S. Taube & Company? A. Yes, sir.

Q. When were you first employed by that company? A. In the fall of 1937. [585]

Q. Now, what was the date of your discharge? [587]

A. Along in February,—I don't know the exact date.

Q. What year? A. In 1941.

Q. In February, 1941? A. No; 1942.

Q. Was it the early part of February?

A. I believe it was somewhere around the tenth or twelfth, somewhere along in there,—the fore part of February, any way. [588] I don't know just the exact date.

Mr. Penfield: Just so there will be no confusion, I believe that is admitted by the pleadings, the exact date, so we can fix it as February fifth. Isn't that correct, Mr. Weston?

Mr. Weston: If that is what the pleadings say.

Trial Examiner Barton: All right; February fifth.

Q. You worked as sorter during that season?

A. Yes, sir.

Q. On a country crew? A. Yes, sir. [589]

(Testimony of Jack Cormi Hendricksen.)

Q. During the time you worked for Taube did you ever have any connection with any labor organization? A. Yes, sir. [590]

Q. And what was your first contact with a labor organization?

A. Well, along in August of last year while I was working with Mr. Blair.

Q. You mean August of 1941?

A. Yes, sir.

Q. Go ahead and tell us what happened?

A. Him and I were working together and he is an executive of the Carpenters' Union,—I don't know just what office he holds,—and we were talking about Unions, and he was having a meeting of the meat cutters and grocery clerks, and he suggested that some of us boys attend that meeting, so myself and Swede Morrell, Hank Morrell, and Lloyd Jergensen attended that meeting. That was along in August some time. I don't know the exact date of that meeting, and he gave us the dope on how to start, that is, to go about to form a union, and it drifted on then for, oh, two or three weeks, and Mr. Rosenbitch contacted me at my home,—

Q. What was that name?

A. Rosenbitch, I believe.

Q. Do you happen to know Mr. Rosquist?

A. Rosquist,—yes, sir; that is the name.

Q. Now, who is Mr. Rosquist?

A. Well, he is,—I just couldn't say just who he is,—he is an executive from Pocatello of the unions down there, or [591] some union now,—I don't know just exactly which it is.

(Testimony of Jack Cormi Hendricksen.)

Q. Is that the American Federation of Labor?

A. The American Federation of Labor, yes, sir; and he suggested we get out petitions.

Q. You say you had a meeting with Mr. Rosquist. When was this, and who was present?

A. Just myself. He contacted me at my home.

Q. Oh, he did?

A. And during this time Mr. Falk,—

Q. Who is that?

A. Carl Falk,—he returned from California. And he assisted me with these petitions.

Q. Now, about what time was this?

A. I would say that was along in the first part of January,—I don't know the exact date, and we got these petitions out.

Q. Will you tell us a little more about these petitions? What were they? [592]

A. These petitions were to be presented to each of the warehouses to find out the exact number of the men that wanted to join the Union.

Q. Who was to circulate the petition?

A. Mr. Falk and myself, and I think Jim Singleton circulated some.

Q. Where was Mr. Falk employed?

A. He was employed by Taube's.

Q. At the warehouse, or on the country crew?

A. At the warehouse.

Q. And where was Mr. Singleton employed?

A. He was on a country crew with me.

Q. And did you circulate these petitions?

A. Yes, sir.

(Testimony of Jack Cormi Hendricksen.)

Q. Who signed them,—I don't mean the specific names of the persons,—I just mean, were they signed by employees? A. Yes, sir.

Q. Were these petitions given to any employees of other potato houses besides Taube's?

A. They were circulated at the Association, Holden Brothers, [593] and the Bonded Warehouse, and I think Dick Wilson's, and Wayne Ellington's.

Q. Were they eventually returned to you?

A. We had one returned from Wayne Ellington's, and Taube's, and I believe that is the only ones I have any recollection of.

Q. What did you do with these petitions that were returned to you?

A. There really wasn't anything done with them. About that time Mr. Hansen came in, and we gave the petitions to Mr. Hansen.

Q. How did you happen to meet Mr. Hansen?

A. Well, I think Mr. Hansen contacted Mr. Falk, and then Mr. Falk contacted me, and we met with Mr. Hansen in the Rogers Hotel.

Q. Do you recall about what time that was?

A. No, sir; I can't,—I don't know the exact date.

Q. Well, can you place it approximately?

A. Well, I would say it was along the latter part of January, but I don't remember exactly.

Q. Had there been any organization meeting of workers at that time? A. No, sir.

Q. It was before that meeting. What occurred at this meeting with Mr. Hansen? [594]

(Testimony of Jack Cormi Hendricksen.)

A. Well, we talked over the activities of a union and what it would do to the spud workers, and I think it was agreed on to call a meeting for the following Thursday night.

Q. Who was present besides yourself?

A. Mr. Falk, and myself, and Mr. Hansen.

Q. It was agreed to call a meeting?

A. The meeting, it was agreed, was to be called the following Thursday, if I remember right.

Q. Do you recall any notices of that meeting?

A. I believe Mr. Hansen had pamphlets prepared to be distributed through the warehouses notifying the workers of the meeting.

Q. Did you see any of the notices?

A. I saw one of the notices at Taube's.

Q. You saw one of the notices of the meeting?

A. Yes, sir.

Q. I call your attention to Board's Exhibit No. 36, and ask you if that is a copy of one of the notices you saw, Mr. Hendricksen?

A. Yes, sir. [595]

Q. Did you attend that meeting?

A. Yes, sir.

Q. Do you recall about how many persons from Taube's attended that meeting?

A. Well, I would judge there were seventy-five per cent of the employees there at that meeting.

Q. Seventy-five per cent of the employees of Taube?

A. Yes, sir.

Q. Do you recall the names of some of them?

[596]

(Testimony of Jack Cormi Hendricksen.)

A. There was Willard Moore; Carl Falk; Singleton,—it would be quite a job to recall too many of them. There is quite a bunch over there.

Q. Do you recall any other meeting of employees at about that time which was not a union meeting?

A. The farmers called a meeting along about that time.

Q. And about when was that, if you recall? Was it after the January sixteenth meeting?

A. Yes, sir.

Q. And what did you hear about that meeting?

A. We were in the country sorting spuds, and Mr. Coon,——

Q. Who is Mr. Coon?

A. He was a buyer for Taube & Company,—he contacted us in the cellar, and wanted two of the crew to attend this meeting, so they selected two to attend the meeting. [597]

Q. And who were selected?

A. Mr. Moore and myself was selected.

Q. Which Moore was that?

A. Willard Moore.

Q. What day of the week was that, if you know?

A. Well, that I just couldn't recall. I really believe it was the latter part of the week, around, I believe, Thursday or Friday. Now, I wouldn't say for sure just the exact date.

Q. Was any mention made of your loss of time?

A. Mr. Coon told us there would be no loss of

(Testimony of Jack Cormi Hendricksen.)

time, that our wages would go on just the same if we actually attended the meeting.

Q. Did you attend the meeting?

A. Yes, sir.

Q. Where was it held?

A. It was held at the city building.

Q. Did you lose anything in wages?

A. No, sir.

Q. About how long were you off work?

A. Oh, I imagine around about three or four hours, I imagine. I think we got back some time after four, and we left at one o'clock. [598]

Q. I believe it has been established that your employment with Taube was terminated on February fifth. Will you tell us exactly what occurred on that day, Mr. Hendricksen?

A. We came in from the country about,—along in the afternoon, I imagine between three and four o'clock, and there was no place else to go, so we just stuck around the warehouse and some of us were playing poker, and George Shipley and I were in the poker game, and Mr. Metcalf called us out,——

Q. Who did he call out?

A. Mr. Shipley and myself. He said there had, —they had to lay off some men, and he hated to do it, but it had come from the office that he had to lay off these men, and we were two of the ones that had to be laid off.

Q. Was Mr. Shipley,—did he work on your country crew? [601]

A. No, sir.

(Testimony of Jack Cormi Hendricksen.)

Q. Do you know of anyone else who was laid off at that time?

A. There was Willard Moore.

Q. Did he work on your country crew?

A. Yes, sir. And James Singleton,—

Q. Was he on your country crew?

A. Yes, sir. And myself off that crew.

Q. Do you know of any others?

A. I think Merv Crandall, and a man by the name of Clements.

Q. Do you know how many in all were laid off?

A. Eleven, I believe. Now, I wouldn't say that for sure, but I believe it was somewhere around eleven.

Q. At the time of your lay off did Mr. Metcalfe say anything else to you?

A. Well, I wanted to find out just the reasons I was discharged, and he didn't know.

Q. You asked him that? A. Yes, sir.

Q. Pardon me.

A. I told him at the time I wanted a definite reason why I was discharged, and he said he didn't know.

Q. Did he make any other comment?

A. I asked him if my work hadn't been satisfactory. He said so far as he was concerned it had been O. K. [602]

Q. Did he say who had told him to lay you off?

A. He said it had come from the office.

Q. Had you been working earlier that day?

(Testimony of Jack Cormi Hendricksen.)

A. Yes, sir.

Q. Perhaps you can explain how it was you happened to be in the warehouse at that time playing poker?

A. Well, we got through with the job in the country; we had finished up and had brought our equipment in to the warehouse.

Q. Were you waiting for a further assignment?

A. Yes, sir.

Q. Is that the manner in which you usually passed the time between assignments?

Trial Examiner Barton: The answer is "yes." Is your answer "yes?"

A. Yes, sir.

Trial Examiner Barton: You have to say it out loud, or the reporter doesn't get it. [603]

SWEN W. SORMAN,

called as a witness by and on behalf of the Board, having first been duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Barton: State your name in full, please.

A. Swen W. Sorman.

Q. (By Mr. Penfield): Where do you reside, Mr. Sorman?

A. How's that?

Q. Where do you live?

A. 246 West Nineteenth.

Q. In Idaho Falls?

A. Yes, sir.

Q. What is your occupation at the present time?

(Testimony of Swen W. Sorman.)

A. Scooping potatoes.

Q. And for whom do you work?

A. Rogers Brothers.

Q. Did you ever work for J. E. O'Neil?

A. Yes, sir.

Q. When did you commence working for Mr. O'Neil?

A. I worked the latter part of 1940-1941 season. That is when I started.

Q. Did you work during the 1941-1942 season?

A. Yes, sir; I worked the full season.

Q. The full season? A. Yes, sir.

Q. And what was your job?

A. Loading cars.

Q. That was your job during that entire season? A. Yes, sir.

Q. During the time you worked for Mr. O'Neil did you ever join any labor organization?

A. I signed up with the Teamsters Union.

Q. Do you recall about what time that was?

A. No, I don't.

Q. Did you attend meetings of the Teamsters Union? A. Yes, sir.

Q. Was that,—can you place about what time of the year that was? [615]

A. Well, it was when they first came in, in January.

Q. Did you attend the first meeting of the Union? A. Yes; I believe I did.

Q. Was that when you signed up?

(Testimony of Swen W. Sorman.)

A. No, sir.

Q. When did you sign up?

A. Well, I don't know what meeting it was after that, but it was after the first meeting I went to that I signed up.

Q. Was it shortly after that? A. Yes, sir.

Q. Would you say within a week after the first meeting?

A. That I couldn't tell, because we had to work some nights when we had meetings up town, and I don't remember just when it was.

Q. Who was the foreman at J. E. O'Neil's?

A. Lloyd Johnson.

Q. Do you recall any conversation with Mr. Johnson after you had joined the Union?

A. Yes, sir.

Q. About how long after you had signed up?

A. About four or five days.

Q. Where did this conversation take place?

A. Down in the warehouse.

Q. Who else was present?

A. Well, there was some fellows around there, I don't know [616] who they were.

Q. You don't recall their names. Were they employees? A. Yes, sir.

Q. Can you tell us just what was said at this conversation?

A. Johnson told me Ed O'Neil and some more guys up town here had a lawyer and was going to break the Union so the Union would never go through. [617]

ROSS MOORE

called as a witness by and on behalf of the Board, being first duly sworn was examined and testified as follows:

Direct Examination

Trial Examiner Barton: Be seated. State your full name please?

The Witness: Ross G. Moore.

Trial Examiner Barton: Ross D.?

The Witness: G.

Q. (Mr. Penfield) Where do you live Mr. Moore?

A. At the present time I live in Oregon City, Oregon.

Q. What is your occupation?

A. Welding.

Q. Where do you work?

A. I work at the Commercial Ship yard.

Q. And where is that located?

A. Portland, Oregon.

Q. Would you try to speak just a little louder?

A. Portland, Oregon.

Q. Did you ever work for L. S. Taube and Sons?

[627]

A. Yes, I did.

Q. And Company, I mean. Your answer was?

A. Pardon me, what was the question?

Q. Did you ever work for L. S. Taube and Company?

A. Yes, I did.

Q. For what period?

A. Well, I worked for them for about 5 years.

Q. Beginning when?

(Testimony of Ross Moore.)

Trial Examiner Barton: Do you remember what year you began?

The Witness: As near as I remember it was about 1937.

Q. (Mr. Penfield) When did you last work for the company? [628]

A. The season ending in 1942.

Q. Did you work continuously during this five years that you worked for Taube?

A. No, not altogether.

Q. Will you state for us the period of which you did not work, during these five years; that is the period during the potato season?

A. Well, I started in late the season of 1941, after the season had already started. And earlier years I worked just in the rush seasons.

Q. Well did you work a complete season in any of these five years?

A. Yes, I did. I put in about four complete seasons. Pretty well complete; just less just a little bit.

Q. When did you commence working during the 1941-1942 season?

A. About November.

Q. What jobs did you hold during the time you worked?

A. The whole period, is that what you mean?

Q. Yes, just tell us what jobs you worked at?

A. Well, I worked at most every job they have. I scooped potatoes and swamped and sorter man and sack sewer; drove truck; crew boss.

(Testimony of Ross Moore.)

Q. Did you work on the country crew most of the time?

A. The biggest period of time, yes. [629]

Q. Do you recall hearing of a meeting of employees at the City Hall?

A. Yes, I do. I was present at that meeting.

Q. About when did that occur?

Trial Examiner Barton: Well I guess there is just one City Hall meeting, isn't there?

Mr. Penfield: Yes, I think so.

Trial Examiner Barton: The date is already fixed.

Mr. Penfield: Yes, January the 21st, yes.

Q. (Mr. Penfield) How were you informed of that meeting?

A. The buyer of the company came out to the cellar and told us about it.

Q. And what did he tell you to do?

A. He told us to send two men in to attend this meeting.

Trial Examiner Barton: Will you name the buyer for us?

The Witness: What? [639]

Trial Examiner Barton: Will you name the buyer for us?

The Witness: Warren Coon.

Q. (Mr. Penfield): And was any action taken with respect to his suggestion? A. Pardon?

Q. When he said to send in two men what did you do?

(Testimony of Ross Moore.)

A. Well, I chose myself and Crandall. There was,—to go into the meeting.

Trial Examiner Barton: With whom did Mr. Coon speak that day about the matter of going to the meeting; all of you or just to you?

The Witness: No, he spoke to the bunch of us.

Q. (Trial Examiner Barton): Were you working at the time or what were you doing?

A. Yes, we were working at the time he came out. [640]

Q. (Mr. Penfield): Mr. Moore, can you tell us what experience or training is necessary to do the various jobs of the country crew; starting first with the job of sorter and tell us something of what skill or experience is required to do that job?

A. To work on the sorter?

Q. Yes.

A. Well, as a cull picker it doesn't take very much experience. Just to pick the small potatoes. There is a grader man or a "2" man, it takes quite a bit of experience to do it properly.

Q. What are some of the things that a sorter has to watch for and know in order to do his job properly; I am speaking particularly with the number "2" men or the grader men?

A. Well, he has to know the,—what potatoes is number one and what is number two; how to make them properly. [642]

Q. What are some of the things that you have to notice about the potatoes in order to determine that?

(Testimony of Ross Moore.)

A. Is that the grading in the number one's or two's or what was you referring to?

Q. Well, grading either one of them.

A. Well, for number two's they had to have the knots trimmed off and had to watch for wire worms and other things.

Q. What do you mean by wire worms?

A. Wire worms, that makes the little holes in the potatoes, have a little hole it makes.

Q. Is that rather difficult to detect?

A. Yes, at times it is very difficult to detect.

Q. Does it affect the grade of the potatoes?

A. Yes, it does; very much.

Q. If it is not detected might it result in a lot being,—not passing inspection?

A. Very easy.

Q. Do the sorters have to exercise any judgment with respect to size or weight?

A. Yes, they do.

Q. Does that,—does it have to be done fairly rapidly? A. Very rapidly, yes.

Q. If the judgment is incorrectly made might that result in a lot not passing inspection?

A. Yes, it easy could. [643]

Q. Is there a practice known as "clipping" in connection with the work?

A. Yes, there is.

Q. What is that?

A. Well, clipping,—clipping for instance jelly ends; the end of the potato would be defected, spoiled and would have to be clipped the end of

(Testimony of Ross Moore.)

the potato off and the knots on potatoes would have to be clipped off.

Q. If a potato is clipped does that affect its grade?

A. That makes,—makes it become a number two, if it is the proper size.

Q. And if a sorter,—strike that. Do I understand you to say that it is necessary to clip some potatoes? A. Yes, it is.

Q. Is it necessary to exercise some judgment in selection of potatoes that you clip?

A. Well yes, yes.

Q. Does it require experience to know which potatoes it is necessary to clip? A. Yes, it is.

Q. How do the sorter men generally acquire their experience in these matters?

A. Well, they usually work on the back end of the sorter to begin with.

Q. And then do they work forward as they,—
[644]

A. (Interposing): Yes, as a rule.

Q. As they gain experience.

Trial Examiner Barton: And how many sorter men does one of these country crews normally have?

The Witness: About four.

Q. (Mr. Penfield): About how long is it necessary to work on a sorter before you can do a satisfactory job as a head grader man?

A. Well that's very difficult to say.

(Testimony of Ross Moore.)

Q. And I presume it would vary with different individuals, but just give an estimate in your own case; how long did you work?

A. Well, about two years.

Q. What sort of experience is required for a job at jigging?

A. Well, jigging in loading bags, in order to do a proper job it takes quite a bit of experience.

Q. Are,—will you explain why that is?

A. Well, the potato sacks are quite small; it is a difficulty to get the potatoes in it the proper weight; get the proper weight in the sacks.

Q. Does each sack have to hold a certain weight?

A. Yes, it does.

Q. Does the jigger have a scale upon which he weighs the potatoes?

A. Yes, they are weighed. [645]

Q. Does he generally speaking estimate the weight before he puts the sack on the scale?

A. Yes, he does.

Q. If he failed to get enough in what would he have to do?

A. Well, as a general rule, why, he would stack the potatoes on them, making it difficult,—stacking more potatoes on,—making it difficult for the sewer to sew them.

Q. Have to go back to the sorter and get some more potatoes, is that right?

A. Yes, that's right.

Q. And would that slow up the operation?

A. Yes, it would.

(Testimony of Ross Moore.)

Q. What about the sack sewer; does that job require experience?

A. Yes, it requires quite a bit of experience.

Q. Is there quite a difference in the speed in which various individuals can do the job?

A. Yes, there is.

Q. Is that skill usually acquired by experience?

A. It requires quite a lot of experience to do a proper job.

Trial Examiner Barton: Just a minute here now. You said there usually are four sorters on a country crew, is that right?

The Witness: Four for,—sorter men, yes. [646]

Trial Examiner Barton: And then one man does the job of jigger?

The Witness: Yes, that makes five.

Trial Examiner Barton: And then there is also the man who is the sack sewer?

The Witness: Yes.

Trial Examiner Barton: That makes six. And now a scooper, there is a scooper?

The Witness: Yes.

Trial Examiner Barton: And then there is,—that makes 7. What comprises the country crew?

The Witness: One more, a swamper.

Trial Examiner Barton: All right. One more who is a swamper and that makes 8. That comprises the country crew then?

The Witness: Yes. [647]

Q. (Mr. Penfield): Did you ever observe any farm hands working on these country crews?

(Testimony of Ross Moore.)

A. At various times a farm hand would step up and give a hand.

Q. Well in those cases did the farm hand fill in an extra [648] hand on an extra job on the crew, or was he just helping temporarily?

A. As a rule he was just helping temporarily.

Trial Examiner Barton: What did he do in the occasions you saw, that happened?

The Witness: As a rule he would take care of the culls or pick out culls on the back of the sorter.

Trial Examiner Barton: Is that the same type of work that you said the sorter men started doing?

The Witness: Yes.

Trial Examiner Barton: Did you ever see these farm hands do any other kind of work in helping the crews?

The Witness: Not that I recall, unless it was maybe scooping a little bit.

Trial Examiner Barton: Did the farm hands help every time you went to a farmer's place to work?

The Witness: No.

Trial Examiner Barton: Did they as a rule?

The Witness: No, as a rule they did not.

Trial Examiner Barton: What about the farmer himself; did he help as a rule?

The Witness: No, the farmer didn't help as a rule.

Q. (Mr. Penfield): Do you have any further questions, Mr. Examiner?

(Testimony of Ross Moore.)

Trial Examiner Barton: Not at this time.

Q. (Mr. Penfield): Was the farmer usually present during the [649] sorting?

A. Well, at various times he was present.

Q. Was that the usual case that he was present or not?

A. No, as a rule he was not there all the time.

Q. Were there cases when he was not there at all?

A. Yes, there was cases.

Q. What did he do in those cases when he was present?

A. Well, he was there,—just his interest.

Q. What would he do; tell us what he did?

A. You mean when he was helping us, is that what you mean?

Q. When he was in the cellar. Did he offer suggestions; did he speak to you; did he tell the men how to work?

A. Well occasionally he would offer suggestions.

Q. And to whom would he make those suggestions?

A. As a rule it was to the crew boss.

Q. What were the nature of the suggestions?

A. Well, in cases where there was potatoes throwed in the two's; that he figured ought to go as number one's; he would call the crew boss's attention to it.

Q. And what action would the crew boss take, if any?

A. Well, if he was right about it, why, the crew

(Testimony of Ross Moore.)

boss usually would speak to the men that happened to be getting the potatoes in the wrong place.

Q. Were there any other type of suggestions that were made?

A. Well, he always told us where to get the potatoes and [650] where he wanted his culls put. Various things like that.

Q. Do you know of any instances where a farmer asked that a man on the crew be discharged or transferred?

A. No, I don't.

Q. Do you know of any instances where a farmer complained to an individual worker about the type of work he was doing?

A. No, I don't.

Q. Do you know of any instances of where the farmer told the individual worker how to do his work?

A. Not that I remember.

Cross-Examination [651]

By Mr. Weston:

Q. Mr. Moore, isn't it a fact that most of these men in the sheds here have gotten experience in sorting potatoes on the farm, in their own sheds?

A. Well, I wouldn't say most of them. Some get experience in handling them, handling potatoes a lot on the farm.

Q. What about the boys working in the sheds in this locality; aren't most of them farmer lads, boys?

A. I believe most of them, yes.

Q. I believe the testimony here by someone the other day was most of the cellars and farms have their own sorters. Is that your impression also,—sorter machines?

(Testimony of Ross Moore.)

A. The sheds, yes; the sheds do.

Q. Well I mean the cellars on the farms?

A. Pardon?

Q. Most of the farms have their own sorter, either shaker or power driven, don't they?

A. I wouldn't say most of them.

Q. What percentage would you estimate?

A. Including shaker sorter and power?

Trial Examiner Barton: I take it the question really is what percentage of the farmers have their own sorters, either [659] power driven or hand operated.

The Witness: Well I wouldn't say over 50 per cent.

Trial Examiner Barton: What proportion of those would you estimate are power-driven?

The Witness: Well not over a third of them; my estimate. [660]

WILLARD MOORE,

called as a witness by and on behalf of the Board, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Barton, Trial Examiner:

Q. State your name in full.

A. Willard Harrison Moore.

Q. (By Mr. Babcock): Where do you live, Mr. Moore?

A. Milwaukee, Oregon.

(Testimony of Willard Moore.)

Q. And where are you employed?

A. Commercial Iron Works, Ship Division.

Q. Did you at one time live in Idaho Falls?

A. Yes, sir.

Q. When was that? [668]

A. Preceding, or before March 15th, or about that time.

Q. Of this year, 1942? A. 1942.

Q. Did you at one time work for L. S. Taube & Company? A. Yes.

Q. When did you work for that company?

[669]

A. Most of the seasons between the fall of 1936 until the spring of 1941 in February; then I worked there, as near as I can recollect, from about the twentieth of December of 1941 until the fifth, or about the fifth, of February, 1942.

Q. How did you happen to leave the company's employment in February of 1941?

A. I had planned a trip to California, and since it was a slack period and there was some talk of other men being laid off perhaps a little later, I talked to the foreman and we decided I should take the lay-off.

Trial Examiner Barton: That was in February, 1941?

A. Yes.

Q. (By Mr. Babcock): Now, during the time you had worked there had there been occasions when men had left the employment of the company before the season was over, voluntarily?

A. Yes, sir.

(Testimony of Willard Moore.)

Q. On those occasions had those men returned the following fall? A. In most cases; yes.

Q. Do you know of any case where a man was refused employment the following fall because he had quit the previous season? A. I do not.

Q. When did you return to work for the 1941-1942 season, [670] Mr. Moore?

A. I don't remember the exact date, but as near as I can recall, it was around the twentieth of December of 1941.

Q. With whom did you talk when you came back to work at that time?

A. With Carl Metcalfe.

Q. What was said? A. As to,—

Q. As to getting a job?

A. When I first talked to him, it was a slack period and there was little chance, and later on he said if I would come over he would put me on, that they needed the men.

Q. During the time you worked for the company, what type of work, what kind of work did you do?

A. I did most everything on the crew except grading.

Q. Was there any particular job you worked at most of the time?

A. Over the period of time I worked as a cull picker and a sorter, I believe, most of the time.

Q. What job did you have when you last worked?

A. Picking culls on the sorter.

(Testimony of Willard Moore.)

Q. Did you work on the cellar crew, or in the warehouse?

A. Most of the time on the cellar crew.

Q. To what extent had you worked in the warehouse? [671]

A. Mostly through the fall rush.

Q. Will you explain what you mean by the "fall rush?"

A. Yes; the period of time from the beginning of spud digging, or handling of potatoes, until the potatoes were out of the ground and the fall rush was over.

Q. During that period,—what is the approximate length of that period?

A. Approximately six weeks.

Q. During that period in your experience with Taube's have they employed cellar crews?

A. No; not that I recall.

Q. Do the sorting crews all work in the warehouse at that time? A. Yes.

Q. Was that true in this case? A. Yes.

Q. During how many seasons did you work in the warehouse in the fall rush?

A. Every fall, from the fall of 1936 until the fall of 1941. I didn't work the fall of 1941.

Q. During the 1941-1942 season after you returned to work, what cellar,—whose cellar crew did you work on? A. Cliff Moore's. [672]

Q. During the entire time?

A. I worked in the warehouse a few days prior to that.

(Testimony of Willard Moore.)

Q. When you returned to work at that time did you learn whether or not there was any discussion among the men of the formation of a Union?

A. Yes; at the time I went to work there the men were discussing the union.

Q. To what extent were they discussing it?

A. Well, it was a common subject.

Q. Was it discussed in the warehouse?

A. At times.

Q. Among the men? A. Yes, sir.

Q. Was,—where did Mr. Metcalf, the foreman, spend his time, working time?

A. Between the crews that were working in the warehouse and the office.

Q. How much of the time was he in the warehouse? A. Where the crews were working?

Q. Yes.

A. Most of the time, or over one-half of the time, I should say, as near as I can remember.

Q. In these discussions were there any employees who were advocating the idea of a union among the potato sorting crews? [673]

A. Yes, there was; they had an interest in the union.

Q. Were there any particular individuals who were promoting the idea more than others?

A. Yes.

Q. Will you give us the names of those individuals? A. C. A. Arnold,—

Q. Pardon me, did you say "Arnold?"

A. C. A. Falk, I should say, and Jack Hen-

(Testimony of Willard Moore.)

dricksen, and after I went to work there, myself, were among the men that were the most interested in the union.

Q. When the Teamsters Union came in here and started holding meetings, did you attend those meetings? A. Yes.

Q. What was the first meeting you attended?

A. About the sixteenth of January. [674]

Q. Were there other employees from Taube's place at the meeting? A. Yes, sir.

Q. Can you give us the names of the persons who worked on the crew you were working on in the cellar country crew?

A. Yes; there were Cliff Moore, who was the foreman, and Jack Hendricksen; Hyrum Beck; Dave Mahoney; Jim Singleton; Cleo Teats; and I don't remember the jigger's name,—I would if I heard it,—and myself.

Q. If you saw the name would you recognize it? [675] A. Yes.

Q. I hand you Board's,—

Mr. Weston: I have no objection to your using a copy.

Mr. Babcock: I don't know the number of the exhibit.

Trial Examiner Barton: It is in Exhibits three to ten, somewhere.

Mr. Babcock: Yes; it is the payroll of the Taube & Company for February fifth.

Q. Will you look through that, Mr. Moore, and see if you can recognize the name of the jigger?

(Testimony of Willard Moore.)

A. Yes.

Q. What is the name? A. Milton Aller.

Q. A-l-l-e-r,—is that right?

A. That may be it. I never saw the name in writing.

Q. Did you attend the meetings of the union, Mr. Moore? A. Yes.

Q. How regularly? A. Most of them.

Q. Did you take part in those meetings,—speak at the meetings? A. A little bit.

Q. Was there a discussion of the union among the members of your cellar crew? [676]

A. Yes.

Q. Did you take part in that discussion?

A. Yes.

Q. Was that discussion common, or uncommon?

A. Well, it was common among the crew.

Q. Were there any particular persons on the crew who were the leaders in that discussion?

A. Yes.

Q. And who were they?

A. Jack Hendricksen and myself.

Q. Did you attend the meeting that was held at the city hall? A. Yes, sir.

Q. Did you speak at that meeting?

A. Yes.

Q. And when you spoke, did you speak so that everyone at the meeting could hear what you were saying? A. I believe I did.

Q. What, in effect, did you say? What was the subject of your talk?

(Testimony of Willard Moore.)

A. My theory on the union was that it could improve conditions, our conditions, without hurting the dealer very much; in other words, we could come to an agreement that would be agreeable both to the employees and the employers. [677]

Q. And what union were you referring to in that talk?

A. The American Federation of Labor, Teamsters Union.

Q. How did you happen to go to that meeting? How did you learn about the meeting?

A. About noon of that same day the buyer, which was Warren Coon, came to the cellar and told us about the meeting.

Q. What did he say?

A. He said there would be a meeting at the city hall between the growers and the employees of the dealers, and that we were two of the members of the crew,—or, rather, two of the crew were to attend, and we would lose no time as to the payroll

Q. Now, how were the members from the crew selected?

A. If I recall right, Cliff Moore after asking the other fellows who they thought should go, and nobody suggested anything; so he suggested Jack Hendricksen and myself, and then he asked the crew as a whole if that was satisfactory with the crew, and they said it was.

Trial Examiner Barton: Was it a common thing

(Testimony of Willard Moore.)

for Mr. Coon, the buyer, to show up when you were out on a country job?

A. Yes.

Trial Examiner Barton: What would he do, as a rule, when he did appear?

A. Oh, often times he would tell us where to go on the [678] next job, and to see how we were getting along, was his main things, that I remember of.

Trial Examiner Barton: All right.

Q. Now, what supervision, if any, did Mr. Metcalf exercise over your work while you were employed by the company?

A. He was the one that told me where to work, or what crew to work on, and so far as I know he had the power of hiring and firing, also.

Q. When you were working on the cellar crew, did he have the opportunity to see what you were doing, what work you were doing?

A. At times.

Q. How often would that be?

A. Not very often last year that I remember of.

Q. Who was the supervisor who was immediately in charge of your work, or over your work?

A. Cliff Moore.

Q. How did you happen to leave the company's employment in February, 1942?

A. We came in from the country one afternoon, along in the middle of the afternoon, if I remember right, and after that time I was told that they didn't need me any longer.

(Testimony of Willard Moore.)

Q. Who told you that? A. Carl Metcalfe.

Q. Were there any other persons present at the time? [679]

A. Who heard the conversation?

Q. Yes, who heard the conversation.

A. I believe Jack Hendricksen was.

Q. Was he laid off at the same time?

A. Yes, sir.

Q. Relate just what Metcalfe said at the time, and what you and Mr. Hendricksen said?

A. As I recall Carl said we were laid off, at least for the present time, and he didn't know how long, and that he didn't really like the idea of us being laid off, or myself, but that it came from over his jurisdiction.

Q. What did you or Mr. Hendricksen say, if anything?

A. We asked if our work wasn't satisfactory.

Q. What did he say to that?

A. He said that so far as he was concerned, if I recall right, that our work was satisfactory.

Q. Had there been occasions before this while you worked for the company when men were laid off, several men at a time? A. Yes.

Q. Had you ever been laid off before?

A. No. [680]

Q. (By Mr. Babcock:) On these previous occasions the company had laid off men, had they, from your observation, given any preference to the older men?

A. They seemed to give a preference to the older men.

(Testimony of Willard Moore.)

Q. State whether it was common, or uncommon, for a man who had worked there two or more seasons to be laid off on those occasions?

A. I would say uncommon.

Q. Can you recall any instances before when it had happened? [681]

A. Offhand, I can't.

Q. During the time you had been employed by the company, had any complaints been made to you about your work by any foreman?

A. Not to my knowledge.

Q. Had you ever been told at any time you might be discharged, or laid off, for any reason?

A. Not that I recall.

Q. What job did Hyrum Beck have on this crew just before the lay-off?

A. *The* was the second grader-man.

Q. How long had he worked for the company?

A. I believe he worked the spring of the year before, but to my knowledge of knowing for sure, that was his first year.

Q. Was he married or single?

A. He was single.

Q. How long had Cleo Teats worked for the company?

A. To my knowledge that was his first year.

Q. What was his job? A. Scooper.

Q. Was he married or single?

A. He was married.

Q. How long had Dave Mahoney worked for the company?

(Testimony of Willard Moore.)

A. If I remember right, that was his second season, or part [682] of his second season.

Q. How long had Milton Aller worked?

A. Two seasons, to my knowledge.

Q. By that you mean this last season was his second season? A. Yes.

Q. The season you were laid off, that was his second season, was it? A. Yes.

Q. What was his job?

A. At the time he was laid off he was the jigger on the crew.

Q. I don't believe I asked you what Mahoney's job was?

A. The biggest part of the time he took care of the Two's and culls.

Q. Which end of the sorter did he work on?

A. Well, since they came off both sides, he worked on both sides of the sorter.

Q. Were any of those individuals laid off?

A. Not to my knowledge. [683]

Q. Now, you had a talk with Mr. Holden over in the hotel after the meeting of March 7th?

A. Yes.

Q. And in this conversation Mr. Holden suggested that you come back over to the warehouse and talk to him, is that correct?

A. Is that a question?

Q. Yes, that is a question. A. Yes, he did.

Q. Did you ever go back?

A. Since there was no date set except sometime, I didn't.

(Testimony of Willard Moore.)

Q. Isn't it a fact he told you to come over any time?

A. Well perhaps it was said any time or sometime, but it wouldn't make a great deal of difference.

Q. Why didn't you go back?

A. Because my interests was at that time, was so that it wasn't convenient for me to go back over.

Q. In other words you weren't interested in a job back there at that time or from then on?

A. Well I was interested in a job over there until after I was quite sure I was going to school at Pocatello.

Q. When did you become sure of that?

A. Around the first of March. As to the date I couldn't say for sure. [702]

Recross Examination

Q. Now, there were eleven people laid off in February 5th, 1942, were there not? [708]

A. As near as I know, there was.

Q. Do you know whether they all belonged to the union or not?

A. I am not positive to that.

Mr. Babcock: (Interposing) I don't think the record is clear as to the other persons laid off. I think perhaps we could stipulate to that if you would like to.

Mr. Weston: All right.

Mr. Babcock: My idea of those laid off, in addition to those named in the complaint, were Eliaa Clements, James [709] Singleton, Howard Ham-

(Testimony of Willard Moore.)

mer, George Shipley and Mertis Morgan. Check that, I think that is correct. Do you want to read those names back Mr. Reporter?

(Whereupon, the last statement of Mr. Babcock was read by the reporter.)

Mr. Weston: That's right. Now, can you stipulate with me whether they were in the union at that time according to your records?

Mr. Babcock: Yes, the records show that they were all members of the union.

Mr. Weston: That is all I have then, I have no further questions.

Mr. Babcock: When I say members, I mean they were members or had applied for membership or designated the union to bargain for them.

[710]

Trial Examiner Barton: I surmise from your testimony Mr. Moore, that you don't want your old job back now, is that correct?

The Witness: Not at the present time. [711]

CLIFFORD MOORE

called as a witness by and on behalf of the Board, being first duly sworn on oath, was examined and testified as follows:

Direct Examination

(Trial Examiner Barton) Be seated. Is your full name Clifford Moore?

A. Clifford Wesley Moore.

(Testimony of Clifford Moore.)

Q. (Mr. Babcock) Where do you live, Mr. Moore? [718] A. 1126 Blaine Avenue.

Q. Idaho Falls? A. Yes sir.

Q. Where are you employed?

A. L. S. Taube.

Q. In what position? A. Crew foreman.

Q. As cellar crew foreman? A. Yes.

Q. Are you related to Ross Moore and Willard who have testified here? A. No.

Q. How long had you worked for Taube as a cellar crew foreman?

A. This is going on the fourth year.

Q. Has that been,—have you worked each season for the last, for each of these four seasons full-time as the cellar crew foreman?

A. Except in the Fall rush and maybe a few instances of about a week when we would be in the warehouse at times during the slack period.

Q. In the Fall rush are cellar crews sent out?

A. Well at times they are but not as a rule.

Q. Before you had the job of cellar crew foreman what position did you have with Taube? [719]

A. Just a sorter hand, you might say, just working just like all the rest of the boys.

Q. And how long have you worked for them altogether?

A. At the end of this season it will be five years.

Q. Has most of that time, with the exception of the Fall rush been spent in cellar crews?

A. Biggest share, yes.

(Testimony of Clifford Moore.)

Q. During the 1941-1942 season when did you first take a cellar crew to the country for sorting, approximately when?

A. I don't remember the exact date, but it was right after the rush was over, most of the digging was done.

Q. Was there a lay-off of some men approximately in December 1941?

A. I believe there was.

Q. Were the number of cellar crews reduced from, at that time, from four to three?

A. I believe so. [720]

Q. Do you know Kenneth Carlson?

A. Yes.

Q. Was he working?

A. Yes, he was working then.

Q. Was he laid off at that time?

A. I believe so.

Q. How long had he worked for the company?

A. I don't know exactly how long, but he was a new man, he come on since the Fall rush.

Q. That was the first season, was it?

A. Yes.

Q. Were any of these individuals that I have named on your [721] cellar crew that Fall?

A. Kenneth Carlson was.

Q. Now, at the time of this lay-off in December, did either Mr. Holden or Mr. Metcalf talk to you concerning the lay-off of these men?

A. At that time, why, Mr. Holden had me in and asked me who I would recommend.

(Testimony of Clifford Moore.)

Q. Recommend for what?

A. For lay-off. I said,—or he said there was a slack season, a slack period coming up and there was a slack on then.

Q. And what did you tell him.

A. I told him as far as I knew Kenneth was last man on and if somebody had to go.

Q. What did he say, Mr. Holden?

A. Well, he just asked a few questions and he didn't state who it would be at that time. [722]

Q. (Mr. Babcock) Mr. Moore, in previous seasons, had there been lay-offs of employees during the season, before the end of the season?

A. I believe there had been as a general rule after the rush was over.

Q. Well on occasions had some of those men been taken from your cellar crew?

A. Well, I don't remember about that.

Q. Do you remember of any instance before December 1941 where at the time of the lay-off men were taken from your crew to be laid off?

A. No, not any specific instances, I don't.

Q. From your observation during your experience with the company and in the event of such lay-offs was any preference given to the men who had been, had more experience with the company, the older men?

A. Well, as far as I know there was, generally the newer men on that were laid off. [723]

Q. Do you recall the occasion of a lay-off in February of this year?

A. Yes.

(Testimony of Clifford Moore.)

Q. Were there any men laid off from your crew at that time? A. Yes, three.

Q. Give us their names?

A. Jim Singleton, Willard Moore and Mr. Jack Hendricksen.

Q. How long had Willard Moore and Jack Hendricksen worked on your crew at that time?

A. Pertaining to that season?

Q. Take Willard Moore first, yes; that season?

A. I don't know just what time Willard Moore came on, it was late that season.

Q. He worked all the time in your crew under your supervision?

A. That season, I believe so.

Q. During previous seasons had he worked under your supervision?

A. I don't remember the exact time he had been on my crew, different seasons.

Q. What about Jack Hendricksen, how often had he worked under your supervision?

A. I believe about two seasons, if I remember.

Q. Were you familiar with the type of work those individuals had been doing? [724]

A. Yes.

Q. With respect to Willard Moore, what had been your observation of his work as to his efficiency and energy at his job?

A. Willard was a good man in the crew.

Q. And with respect to Hendricksen, what had been your observation with him?

(Testimony of Clifford Moore.)

A. He was a steady man and worked good on the crew.

Q. From the standpoint of efficiency on the crew, from your observation of these employees, in your position would you say that those employees were the least efficient on the crew?

A. Well I would say they were about average.

Q. About average. And how did their experience compare with the other members of the crew?

A. Do you mean there,—

Q. (Interposing and continuing) Their length of service with the company?

A. How long they had worked for the company?

Q. Yes, as compared with the others; were they the newest *of* oldest or how did they rank?

A. I believe Willard Moore was working there when I first went to work for Taube's and also Jack Hendricksen.

Q. Did Mr. Metcalf or Mr. Holden consult you concerning this February lay-off? A. No.

[725]

Q. Were you ever asked by Mr. Holden or Mr. Metcalf about the work of Willard Moore during that season? A. No.

Q. And what about Hendricksen? A. No.

Q. Did Mr. Metcalf come to the cellars where you were sorting frequently?

A. Not very often during that season; once in a while he did.

(Testimony of Clifford Moore.)

Q. How often, would you say?

A. Well he didn't make it a practice of coming out; I don't remember of him being over,—coming out over three or four times.

Q. How long did he stay on those occasions?

A. Oh, maybe a half hour at times; fifteen minutes.

Q. For what purpose did he come out on those occasions, if you know?

A. I don't know. Sometimes we would be on the edge of the grade, that is, and he would come and caution us to tighten down a little.

Q. What about Mr. Holden, how frequently was he in the cellar while the crew was working during that last season? A. Well very seldom.

Q. As frequently as Mr. Metcalf or less frequently? A. I imagine about the same.

Q. What about previous seasons, was there any difference in [726] respect to how often they were in the cellars in the seasons before last?

A. No, I imagine about the same.

Q. When the cellar crew sorts the potatoes at the cellar, is the farmer sometimes present?

A. Nearly always.

Q. Nearly always; is he there during the entire time or is he in and out of there?

A. In and out.

Q. And does he observe the work that is being done when he is there? A. Yes.

Q. What part, if any, does he take in the conduct of the work there?

(Testimony of Clifford Moore.)

A. Well he generally watches to see that the job is done right, that is, that we are not throwing one's or two's in the culls.

Q. What things does he watch for?

A. Well generally they generally watch the culls just to see that the grade is made right.

Q. Does he instruct the members of the crew on how to do their work? A. No.

Q. Does he tramp with them from one job to another? A. No. [727]

Q. Does he,—in your experience has a farmer ever discharged an employee in a crew or attempt to do so? A. No.

Q. When he does have any comments to make to whom does he make them? A. Crew boss.

Q. And then what is done about the man?

A. Well, it's up to the crew boss to see if there is a mistake being made, why it is up to him to see they are corrected.

Q. What about if the farmer is wrong and the grade has been made properly, what procedure is followed then?

A. Well, it is the crew boss's job to show him the grade is being made correctly.

Q. In your experience in working in cellar crews have their been occasions when a part of the crew was filled by a farm hand from the farm?

A. There has been times that that is done, but it is very seldom.

Q. On those occasions has it been just temporarily or has the farm hand worked on the crew

(Testimony of Clifford Moore.)

during the entire time that you were sorting in the cellar?

A. Well, at times it's just been temporary and other times he will work there and take the place of a hand while we are at that farmer's cellar. [728]

Q. What is the reason for this, can you explain that?

A. Well, it is very seldom in my experience, maybe only once or twice since I have worked that it has happened.

Q. On those occasions what job on the crew has the farm hand taken?

A. Well in my case any job I gave him to do.

Q. Would he be capable of filling any job on a crew if he had not had experience working on a sorting crew?

A. No, not every job. [729]

CLENCY LORENZO WADSWORTH,

called as a witness by and on behalf of the Board, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Barton: State your full name, please.

A. Clency Lorenzo Wadsworth.

Mr. Babcock: Mr. Examiner, I would like permission to recall Mr. Waldon for one further question, which I neglected to ask him.

Trial Examiner Barton: We will let Mr. Wads-

(Testimony of Clency Lorenzo Wadsworth.)

worth give his name, and then you may ask the question of Mr. Walden where he is sitting. What was your middle name, Mr. Wadsworth?

A. Lorenzo. Clency Lorenzo Wadsworth.

Trial Examiner Barton: Now you may ask your question of Mr. Waldon, Mr. Babcock.

PRESTON WALDON,

recalled as a witness by and on behalf of the Board, having been previously sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Babcock) Mr. Waldon, were you a member of the Union last year?

A. Yes, sir.

Q. Did you ever have any conversation with either Mr. [743] Metcalf or Mr. Holden concerning the Union?

A. Yes, sir.

Q. (By Mr. Babcock) Can you give us the date?

A. No; I couldn't.

Q. The approximate date, with reference to some event that took place there?

A. No; I couldn't do that.

Q. Was it before or after the men were laid off in February?

A. After they were laid off.

Q. Approximately how long?

A. Oh, I would say within the next month.

Q. Very well. Go ahead now and state what

(Testimony of Preston Waldon.)

Mr. Metcalfe, what was said by you and Mr. Metcalfe. [744]

A. They were talking back and forth about it, and the subject was on the contract; they were discussing about the Union contract, and they were just talking back and forth and arguing about it,—not necessarily arguing, just talking, and Mr. Metcalfe said he didn't think very damned much of the Union. He thought the contract was outrageous. He thought that anybody who signed a contract like that would be a damned fool,—just more or less in conversation. [745]

CLENCY LORENZO WADSWORTH,

recalled as a witness by and on behalf of the Board, having been previously sworn, was examined and testified as follows:

Direct Examination

By Mr. Penfield:

Q. Where do you live, Mr. Wadsworth?

A. 293 South Water.

Q. In Idaho Falls? A. In Idaho Falls.

Q. Where are you employed at the present time?

A. Roger Brothers dehydrating plant.

Q. Is that in Idaho Falls? A. Yes, sir.

Q. Were you ever employed by L. S. Taube & Company? A. Yes, sir.

Q. What,—over what period?

(Testimony of Clency Lorenzo Wadsworth.)

A. Well, I would say about three years and a half,—three and a half seasons.

Q. When did you terminate your employment with L. S. Taube? A. The fall of 1938.

Q. I don't know that you understood the question. Is that when you commenced working with Taube's? A. Yes, sir.

Q. When did you cease working for Taube's?

A. Oh, February fifth.

Q. What year? [746] A. 1941.

Q. Last season, was it?

A. Last season, last February fifth.

Trial Examiner Barton: That would be this year then, would it?

A. Yes; it would be 1942.

Q. This year, but last season?

A. Yes; 1942. [747]

Q. Did you ever join a Union? A. Yes.

Q. What Union?

A. The A. F. of L., teamsters.

Q. When did you join?

A. January, I believe.

Q. Of this year? A. Yes.

Q. Did you attend the first meeting of the Union? A. Yes.

Q. Did you sign with the Union at that time?
[749]

A. Yes.

Q. How soon after the first Union meeting at which you signed, were you initiated? Just approximately. A. I would say a week. [750]

(Testimony of Clency Lorenzo Wadsworth.)

Q. About a week? A. Within a week.

Q. Do you recall any conversation with Mr. Metcalfe shortly after you were initiated?

A. No; I don't.

Q. Do you recall any conversation with Mr. Metcalfe in which the Union was mentioned?

A. No; I can't say that I had any particular conversation with him.

Q. Did you ever hear him discuss the Union?

A. Hear him?

Q. Yes. A. Well, a little; yes.

Q. What did he say?

A. Well, he wasn't in favor of it, for one thing.

Q. Well, what did he say?

A. Well, he says, "Now that you belong to the God damned Union do you feel any better about it?"

Trial Examiner Barton: Let's find out when that was.

Mr. Penfield: Yes.

Trial Examiner Barton: How long was that before February fifth?

A. Well, I can't remember, but it seems to me like it was, oh, I would say a week or ten days.

Trial Examiner Barton: And where was this?

[751]

A. At the warehouse.

Trial Examiner Barton: Was there anybody there besides you and Mr. Metcalfe?

A. The whole crew was there.

(Testimony of Clency Lorenzo Wadsworth.)

Trial Examiner Barton: The crew you worked with?

A. Yes.

Trial Examiner Barton: What time of day was it?

A. Well, I couldn't say. It was in the afternoon.

Trial Examiner Barton: What were you doing at the time?

A. We were shut down for a few minutes and just discussing the Union. [752]

MILO RASH,

recalled for further cross examination, having been previous- [764] ly duly sworn, testified as follows:

Further Cross Examination :

Q. (By Mr. Weston:) What about you, Milo?

A. My job?

Q. Yes.

A. It is like I explained: If my wife wasn't tied up on a civil service job, I would consider the job.

Q. But you don't want it at this time?

A. I am unable to take it at this time.

Mr. Babcock: I will ask to have these documents marked as Board's Exhibits 60 to 64, inclusive, for identification.

(Thereupon, the documents hereinabove referred to, were marked as Board's Exhibits 60 to 64, inclusive, for identification.) [765]

Mr. Babcock: Mr. Examiner, we would like to offer in evidence at this time what has been marked for identification as Board's Exhibit No. 60, which is headed, "Marketing Contract." This is offered as being a standard form of marketing contract used by the Idaho Potato Growers in connection with the handling of potatoes from growers, which has been referred to here in the proceedings.

Trial Examiner Barton: Will you agree that is what it is, Mr. Weston?

Mr. Weston: Yes, Mr. Examiner.

Trial Examiner Barton: You have no objection?

Mr. Weston: No.

Trial Examiner Barton: It may be admitted.

(Whereupon, the document heretofore referred to, marked Board's Exhibit 60 for identification, was received in evidence.)

BOARD'S EXHIBIT No. 60

MARKETING CONTRACT

Whereas, The Idaho Falls Potato Growers, a non-profit cooperative association, incorporated under the laws of the State of Idaho, with offices and place of business at Idaho Falls, Bonneville County, is engaged in the business of marketing potatoes for producing members, and,

Whereas, In order to continue said business it is necessary and desirable that said cooperative determine and know the amount of potatoes to be marketed by it during the 1940-1 potato shipping season, and,

Whereas, The sale contracts of said cooperative

with purchasers of potatoes will be based solely on the supply of potatoes through and under marketing agreements with the growers, and,

Whereas, The undersigned grower of potatoes, a member of said cooperative and a stockholder therein, desires to market his potato crop for the year 1940 and each succeeding year through the cooperative and share in the benefits to be derived from cooperative marketing.

Now, Therefore, Upon mutual considerations herein stated, and deemed to be fully and legally sufficient, it is agreed and understood by and between said cooperative and the undersigned grower, as follows, to-wit:

1. That the cooperative is handling potatoes only on a cooperative nonprofit basis.

2. That the cooperative reserves the right to sell potatoes, obtained from the undersigned grower, either on a cash track basis or to ship on wire orders from reliable buyers.

3. That the undersigned grower will market through said cooperative all of the marketable potatoes grown by him for the year 1940 and each succeeding year, excepting such potatoes as he may reserve for seed only.

4. That the undersigned grower has the option to cancel this marketing agreement by giving written notice thereof to said cooperative during the period of June 16 and 30 inclusive of any year during the life of this agreement.

5. That when the undersigned grower has harvested his crop, he will furnish said cooperative

with a certificate showing the number of bushels of potatoes harvested.

6. That since the undersigned grower is a member of said cooperative, this agreement will continue in full force and virtue from season to season, so long as the undersigned grows potatoes, unless the same is canceled at the time of year herein provided.

7. That from the returns received by said cooperative, on the sale of potatoes delivered by the undersigned, there shall be deducted therefrom all costs of handling, grading, sorting, freight, and such other charges as the Board of Directors of said cooperative may fix from time to time, including reserve as provided by law.

8. And it is further understood that the said cooperative must find a market for potatoes at points far removed from Idaho and that said cooperative will make payment for the potatoes delivered by the undersigned grower within seven days from date of sale.

Dated and executed.....19.....

IDAHO ~~FALLS~~ POTATO

GROWERS, a corporation,

By

Its Authorized Agent

Grower.....

Address.....

Mr. Babcock: I wish to offer in evidence Board's Exhibit No. 61, for identification, as being a true and correct copy of the Articles of Amendment of the Articles of Incorporation of the Idaho Falls Potato Growers.

Mr. Weston: No objection.

Trial Examiner Barton: It may be admitted.

(Whereupon the document heretofore marked Board's Exhibit No. 61, for identification, was received in evidence.)

BOARD'S EXHIBIT No. 61

ARTICLES OF AMENDMENT OF ARTICLES
OF INCORPORATION OF THE IDAHO
FALLS POTATO GROWERS

Article I.

The name of this association shall be the "Idaho Potato Growers, Inc."

Article II.

The purposes for which this association is formed, and the powers which the association shall have are:

(a) To promote, foster and encourage the business of producing agricultural products.

(b) To acquire and/or handle and market the agricultural products, or any of the products derived therefrom, of it's members and to engage in any activity in connection with the picking, gathering, harvesting, receiving, assembling, handling, sorting, grading, standardizing, packing, transporting, storing, financing, advertising, selling, mar-

keting, and/or distributing of any agricultural products delivered by it's members or any of the products derived therefrom and in connection with the purchase or use by and/or for it's members of supplies, machinery, and/or equipment, all in any capacity or on any cooperative basis that may be agreed upon.

(c) To purchase or otherwise acquire, and to hold, own and exercise all rights of ownership in, and to sell, transfer, or pledge shares of the capital stock or bonds of any corporation or association engaged in any related activities in hauling or marketing of any of the products handled by the association.

(d) To transact business with nonmembers in an amount not greater in value than the business it transacts with it's members.

(e) To issue revolving fund certificates as provided in it's by-laws.

(f) To borrow money without limitation as to amount or corporate indebtedness or liability; to give a lien on any of its property as security therefor in any manner permitted by law; and to make advance payments and advances to members.

(g) To act as the agent or representative of any member or members in any of the activities mentioned in Article II hereof.

(h) To buy, lease, hold, and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conduct and operation of the business of the association, or incidental thereto.

(i) To draw, make, accept, indorse, guarantee, execute, and issue promissory notes, bills of exchange, drafts, warrants, certificates, and all kinds of obligations and negotiable or transferable instruments for any purpose that is deemed to further the objects for which this association is formed and to give a lien on any of its property as security therefor.

(j) To acquire, own, and develop and promote any interest in patents, trade-marks, and copyrights connected with or incidental to the business of the association.

(k) To cooperate with other similar associations in creating central, regional, or national cooperative agencies, for any of the purposes for which this association is formed, and/or to become a member or stockholder of such agencies as are now or hereafter may be in existence.

(l) To have and exercise, in addition to the foregoing, all powers, privileges, and rights conferred on ordinary corporations and cooperative marketing associations by the laws of the State of Idaho and all powers and rights incidental or conducive to carrying out the purposes for which this association is formed, except such as are inconsistent with the express provisions of the act under which this association is incorporated, and to do any such thing anywhere; and the numerations of the foregoing powers shall not be held to limit or restrict in any manner the general powers which may by law be possessed by this association, all of which are hereby expressly claimed.

(m) All the activities of the association shall be nonprofit, and cooperative in character for the mutual benefit *if* it's members.

(n) The term "member" shall be used to designate a holder of a certificate of membership in the association and who has signed one of the standard marketing agreements with the association.

Article III.

The place where the principal business of this association will be transacted shall be Idaho Falls, Idaho.

Article IV.

The term for which this association is to exist shall be fifty (50) years from and after the date of incorporation.

Article V.

Each member of the association shall be entitled to one vote.

Article VI.

Any person, firm, or corporation, or a manager or officer of any corporation or a member of any firm engaged in the production of agricultural products handled by the association or owning *of* leasing land on which said products are produced, and who shares in the products thereof, and who shall execute one of the standard marketing agreements of the association and take out a certificate of membership in the association, may be admitted to membership in the association.

Article VII.

(a) This association shall not have any capital stock, but shall admit applicants to membership in the association upon such uniform conditions as may be prescribed by the board of directors of the association, or in its by-laws.

(b) This association shall be operated on a co-operative basis for the mutual benefit of its members as producers, and membership in the association shall be restricted to producers, who shall patronize the association.

(c) The voting rights of the members of the association shall be equal and no member shall have more than one vote and the rights of a member to vote shall be suspended in case the member is a nonproducer or ceases for a period of one year to patronize the association, and shall continue so suspended until he again becomes a producer of agricultural products and a patron of the association.

(d) The property rights and interests of each member in the association shall be unequal, and shall be determined and fixed in the proportion that the patronage of each member shall bear to the total patronage of all members with the association.

(e) New members admitted to membership shall be entitled to share in the property of the association in accordance with the foregoing rule.

(f) Certificates of membership in the association are not transferable.

(g) When a member withdraws from the association, he shall surrender his membership certi-

ficate for cancelation and the association shall thereupon issue to such withdrawing member a certificate of interest for such funds as may have accumulated to the credit of the member in addition to the face value of the certificate of membership, said certificate of interest made payable at a time determined and fixed by the board of directors of the association or as provided by the by-laws.

Article VIII.

Except for debts lawfully contracted between him and the association, no member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership certificate, including any unpaid balance on any promissory note or notes given in payment thereof.

13812-d

Articles of Amendment of Idaho Falls Potato Growers

Amended Articles and changing name to
Idaho Potato Growers, Inc.

State of Idaho
Department of State
Secretary's Office
Boise, Idaho

Approved, filed and admitted to the records of Articles of Incorporation of the State of Idaho and certificate issued, this Seventh day of August, 1942 at 1:45 o'clock P.M.

Fees Paid

Filing	\$2.50
Recording	2.80
Certificate	3.00

Total 8.30

GEO. H. CURTIS

Secretary of State.

By AGNES DUNN,
Corporation Clerk.

Mr. Babcock: And Board's Exhibit No. 62, I offer in [766] evidence as being a true and correct copy of the By-laws of the Idaho Potato Growers, Inc., adopted July 31st, 1942.

Mr. Weston: No objection.

Trial Examiner Barton: It may be admitted.

(Whereupon, the document heretofore marked Board's Exhibit No. 62, for identification, was received in evidence.)

BOARD'S EXHIBIT No. 62

BY LAWS

OF

IDAHO POTATO GROWERS, INC.

Adopted July 31, 1942

Article I

The purposes for which this association is formed and the powers which it may exercise are set forth in the articles of incorporation of the association.

Board's Exhibit No. 62—(Continued)

Article II

Directors, Officers and Districts

Section 1. Number.—The business of this association shall be controlled by a board of seven (7) directors, each of whom shall be a member of this association.

Section 2. Districts. The territory served by this association is hereby divided into four districts as follows:

District No. 1 (Idaho Falls)

District No. 1 shall comprise that portion of Bonneville County, Idaho, in which members have their residence who deliver to, or who have been assigned by the board of directors to deliver to, the Idaho Falls warehouse of the association.

District No. 2 (Shelley)

District No. 2 shall comprise those portions of Bonneville and Bingham Counties, Idaho, in which members have their residence who deliver to, or who have been assigned by the board of directors to deliver to, the Shelley warehouse of the association.

District No. 3 (Blackfoot)

District No. 3 shall comprise those portions of Bingham and Bannock Counties, Idaho, in which members have their residence who deliver to, or who have been assigned by the board of directors to deliver to, the Blackfoot warehouse of the association.

Board's Exhibit No. 62—(Continued)

District No. 4 (Burley)

District No. 4 shall comprise those portions of Minidoka and Cassia Counties, Idaho, in which members have their residence who deliver to, or who have been assigned by the board of directors to deliver to, the Burley warehouse of the association.

Any member's product may be received at more than one district warehouse of the association, but no member shall vote in more than one district in any one year. Members, who by their residence do not fall naturally into any of the then established districts, shall be assigned by action of the board of directors to the nearest or more convenient district for voting privileges.

Section 3. Redistricting. The board of directors may, in their discretion, not less than 60 days nor more than 90 days prior to any annual meeting change the areas comprising existing districts, decrease the number of districts, or create new districts, for purposes of equitable representation, provided that, not more than seven (7) such districts may be thus established by action of the board of directors. Each district shall have at least one director and in any case in which the number of districts is increased, the number of directors to be elected from District No. 1 shall be decreased accordingly, and in any case in which the number of districts is decreased the number of directors to be elected from District No. 1 shall be increased accordingly. The board, in making any change with respect to districts, shall give consideration to geographic and volume factors.

Board's Exhibit No. 62—(Continued)

Section 4. Board of Directors. The members of the present Board of Directors, heretofore duly elected, shall serve out their respective terms of office for which they were elected. District No. 1 shall have four (4) members on the Board: District No. 2 shall have one (1) member on the Board: District No. 3 shall have one (1) member on the Board: and District No. 4 shall have one member on the Board. At the annual meeting of the association to be held August 13, 1942, Four (4) directors shall be elected; two (2) from District No. 1 for a term of three (3) years: One from District No. 2 for a term of three (3) years: and One (1) from District No. 4 for a term of one (1) year. At each subsequent annual meeting a director or directors shall be elected from the District or Districts for a term of three (3) years, to fill the vacancy or vacancies caused by the expiration of the term or terms for which their predecessors were elected. Directors shall hold office until their successors have been elected and qualified and have entered upon the discharge of their duties. No person shall be eligible for the office of director if he is in competition with or is affiliated with any enterprise that is in competition with the association, and if a majority of the board of directors of the association finds at any time following a hearing that any director is so engaged or affiliated, he shall thereupon cease to be a director.

Section 5. Vacancies. Whenever a vacancy occurs in the board of directors, other than by expira-

Board's Exhibit No. 62—(Continued)

tion of term, the remaining directors shall appoint a member from the respective district to fill such vacancy until the next annual meeting of the members.

Section 6. Election of Officers. The board of directors shall meet within five (5) days after each annual election and shall elect by ballot a president, vice president, secretary-treasurer, each of whom shall hold office until the election and qualification of his successor unless earlier removed by death, resignation, or for cause. The president and vice president only need be members of the board of directors.

Section 7. Compensation. The directors shall receive no compensation for their services as directors, other than reimbursement for transportation actually expended by them in attending the meetings of the board of directors and any other necessary expenses and a per diem of \$4.00 per day for each day necessary for traveling to and from and for attendance at meetings.

Article III

Duties of Directors

Section 1. Management of Business.—The board of directors shall have general supervision and control of the business and the affairs of the association and shall make all rules and regulations not inconsistent with law or with these bylaws for the management of the business and guidance of the members, officers, employees, and agents of the as-

Board's Exhibit No. 62—(Continued)

sociation. They shall have installed an accounting system which shall be adequate to the requirements of the business, and it shall be their duty to require proper records to be kept of all business transactions.

Section 2. Employment of Manager. The board of directors shall have power to employ or to authorize the employment of a manager and such other employees as may be deemed necessary, and to fix their compensation. The manager shall have charge of the business of the association under the direction of the board of directors. No director shall serve as manager.

Section 3. Bonds and Insurance. The board of directors shall require the manager and all other officers, agents, and employees charged by the association with responsibility for the custody of any of its funds or negotiable instruments to give adequate bonds. Such bonds, unless cash security is given, shall be furnished by a responsible bonding company and approved by the board of directors, and the cost thereof shall be paid by the association. The board of directors shall provide for the adequate insurance of the property of the association, or property which may be in the possession of the association, or stored by it, and not otherwise adequately insured, and in addition adequate insurance covering liability for accidents to all employees and the public.

Section 4. Audits. At least once in each year

Board's Exhibit No. 62—(Continued)

the board of directors shall secure the services of a competent and disinterested public auditor or accountant, who shall make a careful audit of the books and accounts of the association and render a report in writing thereon, which report shall be submitted to the members of the association at their annual meeting. This report shall include at least (1) a balance sheet showing the true assets and liabilities of the association; (2) an operating statement for the fiscal period under review which shall show the cost of, and income from, sales and the gross income or loss from each of the commodities handled during the period; (3) an itemized statement of all expenses for the period under review.

Section 5. *Agreements With Members.* The board of directors shall have the power to carry out all agreements of the association with its members in every way advantageous to the association representing the members collectively.

Section 6. *Depositary.* The board of directors shall have the power to select one or more banks to act as depositaries of the funds of the association and to determine the manner of receiving, depositing, and disbursing the funds of the association and the form of checks and the person or persons by whom same shall be signed, with the power to change such banks and the person or persons signing such checks and the form thereof at will.

Board's Exhibit No. 62—(Continued)

Article IV

Duties of Officers

Section 1. Duties of President. The president shall (1) preside over all meetings of the association and of the board of directors, (2) call special meeting of the board of directors, (3) perform all acts and duties usually performed by an executive and presiding officer, and (4) sign all membership certificates, and such other papers of the association as he may be authorized or directed to sign by the board of directors; provided, however, That the board of directors may authorize any person to sign any or all checks, contracts, and other instruments in writing on behalf of the association. The president shall perform such other duties as may be prescribed by the board of directors.

Section 2. Duties of the Vice President. In the absence or disability of the president, the vice president shall perform the duties of the president: Provided, however, that in case of death, resignation, or disability of the president, the board of directors may declare the office vacant and elect his successor.

Section 3. Duties of Secretary. The secretary shall keep a complete record of all meetings of the association and of the board of directors and shall have general charge and supervision of the books and records of the association. He shall sign all membership certificates with the president and such other papers pertaining to the association as he may be authorized or directed to sign by the board of

Board's Exhibit No. 62—(Continued)

directors. He shall serve all notices required by law and by these bylaws and shall make a full report of all matters and business pertaining to his office to the members at the annual meeting. He shall keep the corporate seal and the book of blank membership certificates, complete and countersign all certificates issued, and affix the corporate seal to all papers requiring a seal.

He shall keep complete membership certificate records. He shall act as secretary of the executive committee. He shall make all reports required by law and shall perform such other duties as may be required of him by the association or the board of directors. Upon the election of his successor, the secretary shall turn over to him all books and other property belonging to the association that he may have in his possession.

Section 4. Treasurer. The treasurer shall perform such duties with respect to the finances of the association as may be prescribed by the board of directors.

Article V

Executive Committee

Section 1. Power and Duties. The board of directors may in their discretion appoint from their own membership an executive committee of three (3) members, determine their tenure of office, their powers and duties. The executive committee shall have such powers and duties as may, from time to time, be prescribed by the board of directors and these duties and powers may be all of the duties

Board's Exhibit No. 62—(Continued)

and powers of the said board of directors, subject to the general direction, approval, and control of the board of directors. Copies of the minutes of any meeting of the executive committee shall be mailed to all directors within two (2) days following such meeting.

Article VI

Duties of Manager

Section 1. In General. Under the direction of the board of directors the manager shall have general charge of the ordinary and usual business operations of the associations, including the purchasing, marketing, and handling of all products and supplies handles by the association. He shall, so far as practicable, endeavor to conduct the business in such a manner that the members will receive just and fair treatment. The manager shall deposit all money belonging to the association which comes into his possession in the name of the association in a bank selected by the board of directors and if authorized to do so by the board of directors shall make all disbursements by check therefrom for the ordinary and necessary expenses of the business in the manner and form prescribed by the board of directors. Upon the appointment of his successor, the manager shall deliver to him all money and property belonging to the association which he has in his possession or over which he has control.

Section 2. Duty to Account. The manager shall be required to maintain his records and accounts in such a manner that the true and correct condition

Board's Exhibit No. 62—(Continued)

of the business may be ascertained therefrom at any time. He shall render annual and periodical statements in the form and in the manner prescribed by the board of directors. He shall carefully preserve all books, documents, correspondence, and records of whatever kind pertaining to the business which may come into his possession.

Section 3. Control of Employees. Subject to the approval of the board of directors, the manager shall employ, supervise and dismiss all agents and employees of the association not specifically employed by the board of directors.

Article VII

Members, Patrons, and Voting

Section 1. Members' Qualifications. Any person, firm, partnership, corporation, or association, including both landlords and tenants in share tenancies, who is a bona fide producer of agricultural products in the territory in which the association is engaged in business, and who agrees to be a patron of the association, may become a member of the association by meeting such conditions as may be prescribed by the board of directors.

Section 2. Membership Certificates. The board of directors shall cause to be issued appropriate nontransferable certificates of membership.

Section 3. Nonmember Patrons. The association may transact any authorized business with nonmembers provided that the total value of business transacted by the association with nonmembers in any

Board's Exhibit No. 62—(Continued)

fiscal year shall not exceed the total value of business transacted with its members. Nonmember patrons shall be treated the same as members with respect to the distribution and allocation of income. The association shall have the right to retain an amount of the patronage allocation of a nonmember patron equal to the membership fee, if such patron is eligible for membership in the association and is approved by the board of directors.

Section 4. Voting. The voting power of the members of this association shall be equal, and each and every member herein shall have one vote only. No cumulative or proxy voting shall be allowed, but any member may vote by mail on any specific question on a ballot to be prepared by order of the board of directors, and mailed with the notice of the meeting.

Article VIII

Revolving Capital

Section 1. Revolving-Fund Certificates. The association is authorized to issue and sell to members and others revolving-fund certificates, of a character hereafter described, for the purpose of raising capital funds with which to engage in business, and in order to further the cooperative character of this association and provide a means whereby its current and active patrons, members and nonmembers alike, will finance the association thereafter, the association is authorized to issue revolving-fund certificates evidencing deductions made pursuant to agreements and/or patronage dividends, which are

Board's Exhibit No. 62—(Continued)

in whole or in part, so paid, at the end of each fiscal year. Funds arising from the issue of such certificates shall be used for creating revolving fund for the purpose of building up such an amount of capital as may be deemed necessary by the board of directors from time to time and for revolving such capital, and such funds and other funds derived from any other source shall, when, in the opinion of the board of directors of the association such funds are not necessary for the proper financing of the operations of the association, be devoted to the refunding of the oldest outstanding revolving-fund certificates. Such certificates may contain such other terms and conditions not inconsistent herewith as may be prescribed from time to time by the board of directors of the association. Such certificates shall be issued in annual series, each certificate in each series upon its face being identified by the year in which it is issued; and each series shall be retired fully or on a pro rata basis, only at the discretion of the board of directors of the association, in the order of issuance by years as funds are available for that purpose. Such revolving-fund certificates shall bear such rates of interest and only such rates of interest (in no event to exceed 6 per cent per annum) as the board of directors of the association in its sole discretion may from time to time prescribe without any obligation on the part of the board of directors and the association to pay interest on such certificates. A record of all holders of revolving-fund certi-

Board's Exhibit No. 62—(Continued)

ificates shall be kept and maintained by the association and such certificates shall be transferable only on the books of the association and no transfer of certificates shall be binding upon the association unless so transferred. All other debts of the association, both secured and unsecured, shall be entitled to priority over all outstanding revolving-fund certificates. Upon the dissolution or winding up of the association in any manner, after the payment of all other debts, all outstanding revolving-fund certificates shall be retired in full or on a pro rata basis without priority before any liquidation dividends are declared on membership certificates or on account of property interests.

Section 2. Reserves. The books and records of the association shall be kept in such a manner, by years, that the amount carried to general reserves accruing from patronage of each patron, member and nonmember alike of the association may be ascertained anytime. Whenever in a given year the operation of the association results in a net loss, such loss, to the extent that general reserves are available, shall be charged against the same and they shall thereby be reduced accordingly. The board of directors shall prescribe the basis on which the reserve contributions of patrons by years shall be reduced on account of any such loss, so that it will be borne by the patrons on as equitable a basis as the board of directors find practicable. Whenever in the discretion of the board of directors the reserves are found to be in excess of the amount

Board's Exhibit No. 62—(Continued)

deemed reasonably necessary for the sound financial operations of the association, such excess shall be applied to paying off ratably, by years, the oldest unexhausted reserve contributions of patrons. Upon the dissolution or winding up of the association in any manner after the payment of all debts, including revolving-fund certificates, any reserves remaining shall be distributed to the patrons before any liquidation dividends are declared on account of membership certificates or property rights and interests.

Article IX

Fiscal Year, Meetings

Section 1. Fiscal Year. The fiscal year of this association shall commence on the first day of July and end on the last day of June.

Section 2. Annual Meeting. The annual meeting of the members of the association shall be held at the city of Idaho Falls, State of Idaho, on the second Thursday in August of each year, at the hour of said day and at the place designated by the Board of Directors, or the Board of Directors shall fix the date and place for said annual meeting at least thirty (30) days in advance of the second Thursday in August.

Section 3. Order of Business. The order of business at the annual meeting shall be:

- (1) Roll call.
- (2) Proof of due notice of meeting.
- (3) Reading and disposal of minutes.
- (4) Annual reports of officers and committees.

Board's Exhibit No. 62—(Continued)

- (5) Election of directors.
- (6) Unfinished business.
- (7) New Business.
- (8) Adjournment.

Section 4. Special Members Meetings. Special meetings of the members of the association may be called at any time by order of the board of directors, and shall be called at any time upon a written request, stating the time, place, and object of the meeting, signed by at least ten (10) percent of the members, provided, however, that in no case shall the required number of signatures to such a request be less than twenty-five (25).

Section 5. Notice of Meetings. Written or printed notice of every regular and special meeting of members shall be prepared and mailed to the last known post-office address of each member not less than ten (10) days before such meeting. Such notice shall state the object or objects thereof and the time and place of meeting and, in the discretion of the board of directors, may be given by publishing the same at least ten (10) days prior to the date of the meeting in a newspaper of general circulation published in the town where the principal place of business of the association is located. No business shall be transacted at special meetings or other than that referred to in the call.

Section 6. Annual District Meetings. District meetings of the members of this association shall be held annually in each district as hereinabove provided, on a date, at a place, and in a manner

Board's Exhibit No. 62—(Continued)

to be prescribed by the board of directors, not more than 60 days immediately preceding the date of the regular annual meeting of all members. The principal business of such annual district meetings shall be to nominate one member (or more as hereinabove provided) residing in each such district to serve as director from said district for the ensuing term. Such nominee (or nominees) shall be presented to the regular annual meeting of the association for election by the majority vote of members present and voting at such meeting.

Section 7. Board Meetings. Regular meetings of the board of directors shall be held (monthly, quarterly, or semiannually) or at such other times and at such places as the board may determine.

Section 8. Special Board Meetings. A special meeting of the board of directors shall be held whenever called by the president or by a majority of the directors. Any and all business may be transacted at a special meeting. Each call for a special meeting, shall be in writing, signed by the person or persons making the same, addressed and delivered to the secretary, and shall state the time and place of such meeting.

Section 9. Notice of Board Meeting. Notice of the regular or special meetings of the directors shall be mailed to each director at least five (5) days prior to the time of such meeting.

Board's Exhibit No. 62—(Continued)

Article X

Quorum

Section 1. Members' Meetings. Five (5) percent of the members present in person or voting by mail shall constitute a quorum for the transaction of business at any meeting of the association except for the transaction of business concerning which a different quorum is specifically provided by law or by these bylaws; But in the event a quorum is not present such meetings may be adjourned from time to time by those present until a quorum is obtained.

Section 2. District Meetings. At any district meeting ten (10) percent of the members of such district shall constitute a quorum for the transaction of any business.

Section 3. Directors or Executive Committee. At any regular or special meeting of the directors or executive committee a majority of the members shall constitute a quorum.

Article XI

Miscellaneous Provisions

Section 1. Bylaws Printed. After adoption, these bylaws, preceded by the articles of incorporation, shall be printed in pamphlet form and a copy thereof shall be delivered to each member and to each person who may later become a member of the association hereafter as shown on the books of record.

Section 2. Seal. The seal of the association

Board's Exhibit No. 62—(Continued)

shall contain these words "Idaho Potato Growers, Inc." in circular form."

Article XII

Amendments.

These bylaws may be altered or amended if a quorum is present at any regular meeting, or any special meeting of the members of this association called for that purpose, by the affirmative vote of two-thirds of the members present at any such meeting; provided, that if the question of altering or amending the bylaws is submitted to a vote of the members by mail, that then the affirmative vote of a majority of all members voting, by mail or otherwise, shall be required.

I do hereby certify that the above and foregoing is a true and correct copy of the bylaws of the "Idaho Potato Growers, Inc." as amended and adopted by a meeting of the members of the Association on July 31, 1942, at the warehouse of the association in the City of Idaho Falls, Idaho.

[Seal]

FRED GUSTAFSON

Secretary, Idaho Potato
Growers, Inc.

Mr. Weston: We would like to amend our answer to meet the amendment to the complaint. I think it was alleged that there were certain increases in wages.

Trial Examiner Barton: All right. Are you ready to dictate your amendment to the answer to that portion of the complaint which is amended into the record. [779]

Mr. Weston: Comes now the Respondents and asks leave to amend their answer by entering a general denial, or denying the additional,—the addition made to Paragraph 15, being sub-section 5 of the complaint, by way of explanation that certain increases in wages were made to meet the increased cost of living and to retain employees on the job. I believe that is sufficient.

Trial Examiner Barton: You want it read back now?

Mr. Weston: Yes.

Trial Examiner Barton: Will you read it back, Mr. Reporter?

(Whereupon, the above stipulation was read back by the Reporter.)

Mr. Penfield: I have no objection. I think there might be an error there though. I believe you stated "denying the addition made to paragraph 15, sub-section 5," and in fact sub-section 5 was added as an addition to paragraph 15.

Trial Examiner Barton: Off the record, and we can make the correction.

(Discussion off the record.)

Trial Examiner Barton: Will you read it now, Mr. Reporter?

(Whereupon, the above stipulation as appearing lines 2 to 8 inclusive in corrected form, were read back by the Reporter.) [780]

FARREL L. HANSEN

having been previously sworn and testified, was recalled by the Respondents and examined and testified further as follows:

Direct Examination

By Mr. Weston:

Q. Mr. Hansen, were you present in the court room when Mr. Ray Hansen testified with reference to a meeting in the City Hall?

A. Yes sir.

Q. And did you hear Mr. Ray Hansen testify as to a statement [781] made by Mr. Fred Gustafson, made at that meeting?

A. Yes, sir.

Q. (Mr. Weston): What did Mr. Ray Hansen state that Mr. Fred Gustafson stated at that meeting that you heard; heard yesterday?

A. He said that Mr. Gustafson made the statement that he would gladly spend 20 years in jail for the privilege of running a pitch-fork through Ray Hansen's guts.

Q. Were you present at the time of the meeting? [782]

A. You are speaking of the meeting in the City Hall?

Q. Yes. A. Yes sir, I was.

Q. Did you hear Mr. Gustafson make that statement?

A. No sir, I did not hear Mr. Gustafson make that statement.

Q. Did you hear him talk at that meeting?

A. Yes sir.

(Testimony of Farrel L. Hansen.)

Q. Were you close enough so you could hear him all right? A. Yes sir.

Q. If he had made that statement would you have heard him? A. I am sure I would.

Q. Did you hear any statement made by Mr. Gustafson of anything of that character or nature?

A. No sir.

Cross-Examination [783]

Q. (Mr. Penfield): Well Mr. Hansen, you did hear Mr. Gustafson speak, did you? A. Yes.

Q. What did you hear him say?

A. Oh, quite a few statements, with regard to the labor situation, and his attitude toward labor, toward the writing on the statute books of Idaho a potato grading law.

Q. As a matter of fact he did refer to Ray Hansen, didn't he?

A. Not to my knowledge or recollection.

Q. You have no recollection of his referring to Ray Hansen at all? A. Personally, no.

Q. He did refer to the union coming in though, didn't he? A. Yes, he did.

Q. And he expressed considerable hostility towards the unions coming in, didn't he?

A. No, he didn't. Mr. Gustafson was one of the gentlemen there who exhibited quite a spirit of friendliness. I could further illustrate that if you would like to hear it and what I do recall he said.

Q. Well, go ahead.

A. He made this statement, that he and I were instrumental in getting the legislature to write on the law books of the State of Idaho, a certain

(Testimony of Farrel L. Hansen.)

grading law, which required that [784] potatoes be graded and branded before they could leave the State. He said one of the *principle* reasons why that law was put on the books was because there was a lot of idle labor in our State in the winter time and that it would be a big factor in giving those boys employment through the winter time and that was one of the primary reasons why that law was enacted. He further stated that he had always been friendly to labor and wanted them to get a fair break. In fact, I think that is almost the very words he said.

Q. And that he thought they would get the fairest break by forming their own union?

A. He didn't state that from his statement, but I would infer that from his attitude, that was his thought.

Q. He didn't think they would get a fair break from the Teamsters' Union coming in?

A. I think from what he said that he understood the leadership that had come in to Idaho Falls to lead the men, that they would be led into an extreme position, so that they wouldn't get so much work under that union leadership as they would if they provided their own leadership to handle their problems.

Q. And that leadership was Ray Hansen?

A. Well indirectly presumably.

Q. And of course you knew who Ray Hansen was?

A. Well not until that day. That is the first

(Testimony of Farrel L. Hansen.)

time I think any of them had met Ray or knew what he looked like or what he [785] was doing.

Q. But you knew he was in town to organize the union?

A. Well, if you are referring to me personally,—I don't know what Mr. Gustafson's knowledge, what he knew,—but I had heard several reports that there were several various organizers in town.

FRED GUSTAFSON

called as a witness by and on behalf of the Respondents, being first duly sworn on oath, was examined and testified as follows:

Direct Examination

Trial Examiner Barton: Be seated, please. Will you state your full name?

The Witness: Fred Gustafson (spelling).

Q. (Mr. Weston): You live near here, do you, Mr. Gustafson?

A. Yes, I just live a mile out from town.

Q. And how long have you lived in this community, Mr. Gustafson?

A. Since 1894. [786]

Q. And do you raise potatoes?

A. Yes sir.

Q. Are you a member of the Idaho Cooperative,—or the Idaho Potato Growers Incorporated?

A. Yes sir.

Q. You hold a position with them?

A. Yes sir.

(Testimony of Fred Gustafson.)

Q. What is that position?

A. Well, I am on the Board and Secretary-Treasurer.

Q. Now, were you present at a meeting in the City Hall called along about January 24th, I believe that is the date? A. Yes sir, I was.

Q. And did you give a talk at that meeting?

A. I did.

Q. You heard Mr. Farrel Hansen just testifying, did you? A. Yes sir.

Q. And you heard him testify that Mr. Ray Hansen had stated that you had made a statement at that meeting?

A. I just come in and he probably had said that before I come in.

Q. Well, it was testified to here last week by Mr. Ray Hansen that in your talk you made this statement that you would gladly spend 20 years of your life in the penitentiary if you could run a pitch-fork through Ray Hansen's guts,—

A. (Interposing): Are you allowed to call anything a damn [787] lie here or should I just say "no."

Q. Now Mr. Gustafson, you just use your own expression, any way that you want to answer the question; I am asking did you make that statement,—

A. (Interposing): No sir.

Q. (Continuing): Is that a correct statement of what you said? A. Yes sir.

Q. Well, that's wrong there. I am asking you if that is a correct statement of what he stated

(Testimony of Fred Gustafson.)

you said. Will you take that off the record, I got you mixed up there. My record is wrong now. I will ask you if you made any such statement at that meeting at all? A. I did not.

Q. Now, I know my record is wrong because he didn't understand that question but I presume this last answer will correct it.

Trial Examiner Barton: Did you make any references to pitchforks at all when you talked?

The Witness: I did not.

Q. (Mr. Weston): Did you make any reference in your talk of Ray Hansen? A. I did not.

Q. Did you know Ray Hansen at that time?

A. I had never seen the man before. [788]

Q. Did you talk directly to,—I will withdraw that question. Now, in addition to what Mr. Farrel Hansen has testified you stated at that meeting can you tell us anything else in your talk you stated?

A. I said that Mr. Hansen and I put that grading law through the Legislature, was what the main point we talked on was; and that was the reason why so many was with us, was that we had so much idle labor in the winter and if we put that law through we would be benefitted both ways, both getting a better price for our products and on account of our long freight rates; and also provided labor work for this unemployed labor in the winter. That was our main point and that was the statement I made. And I think I did say that we don't make any interference with our grading of the potatoes. I didn't mention union or any-

(Testimony of Fred Gustafson.)

thing else. And another thing I said was that I have had men working for me for the last forty years and I always aim to have a man working for me as my friend, because the,—if the man working for you isn't your friend he is no good to you and that is the spirit I always wanted to enact into our Association. That our men working for us shall be our friends and be treated right, and paid so that they can live as they should. Now I think that was just about all that I said at that meeting.

Q. Did you make any suggestions at that meeting with reference to what the local employees should do? [789]

A. I don't think I talked on that point at all.

Cross-Examination

By Mr. Penfield:

Q. Mr. Gustafson, you were a member of the committee that arranged to hold that meeting, were you not?

A. No, that wasn't arranged by a committee at all. It was, I think, arranged by all the potato dealers and our manager, I can't remember if I had anything to do with the arrangement; I don't think I did.

Q. You attended the meeting held the day before at which it was decided to call a meeting at the City Hall, did you not?

A. I don't remember.

Q. Do you know why this meeting was called?

A. I don't remember just why it was called.

[790]

(Testimony of Fred Gustafson.)

Q. Well now as a matter of fact Mr. Gustafson, it was called after you heard that the Teamsters Union was attempting to organize the employees so that you could recommend to the employees that they form their own organization, wasn't it?

A. That might have been it; I forgot.

Q. And that was discussed at this meeting, was it not, the formation of an organization?

A. I believe it was talked amongst the men, the working men was all invited to this meeting and if I remember right Mr. Ray Hansen,—is that his name,—come into that meeting without any invitation whatsoever and there was a question raised whether he should be allowed to stay or not and we couldn't see why he shouldn't stay. We couldn't see anything but a friendly attitude on his side, so we couldn't see why he shouldn't stay, so he was invited to stay; I think I am right on that.

Q. As a matter of fact,—

A. (Interposing & continuing): This was a long time ago you know.

Q. (Continuing): —Mr. Gustafson, you were rather alarmed at the prospect of an outside union coming in, were you not?

A. Not any more than any other farmer.

Q. But you all were, were you not?

A. The farmers all were,—could I make a statement about that? [791]

Q. Go ahead.

A. Well all the farmers felt that they were the ones to pay the bill, if there was to be an increase in the bills by organizing and they felt that they

(Testimony of Fred Gustafson.)

should have a right to sit in and make a deal and not the potato dealers, because they don't pay the bill anyhow. That was what the farmers were all concerned about that they would make a deal with the dealers.

Q. So what you thought then was the best thing to do would be to get together and call a meeting of all the employees and explain how you felt about it?

A. I believe that might have been it. [792]

ERNEST NORELL

called as a witness by and on behalf of the Respondents, being first duly sworn on oath, was examined and testified as follows:

Direct Examination

By Mr. Weston:

Q. Will,——

Trial Examiner Barton: Be seated. Your full name, please?

The Witness: Ernest Norell.

Trial Examiner Barton: How do you spell the second name?

The Witness: Norell (spelling).

Q. (Mr. Weston): Where are you working at the present time, Mr. Norell?

A. Idaho Falls Potato Growers.

Q. How long have you worked there? [794]

A. Ten years altogether I guess.

(Testimony of Ernest Norell.)

Q. Were you present at a meeting on January 24th in the City Hall here in Idaho Falls?

A. Yes sir.

Q. Did you hear Mr. Gustafson make a talk at that meeting?

A. I did hear him talk; I don't remember what it was; he did make a talk.

Q. Where were you with reference to where Mr. Gustafson was, how close were you to him?

A. As far as from here to this man (Indicating).

Trial Examiner Barton: Indicating to the Reporter, a distance of about 5 feet would say, away?

The Witness: 5 or 6 feet, something like that.

Trial Examiner Barton: All right.

Q. (Mr. Weston): And you could hear his talk all right? A. Oh yes.

Q. The statement has been made here about, that in his talk he made this remark; that he would gladly spend 20 years in the penitentiary to be able to run a pitch-fork through Mr. Ray Hansen's guts, or words to that effect; did you hear him make that statement? A. No sir.

Q. Did,—would you say he didn't make that statement?

A. Well I don't remember hearing him say it.

Q. You heard his whole talk, did you? [795]

A. Yes sir.

Q. That's all. Just one more question. Are you a member of the union, Mr. Norell?

A. Yes sir.

Mr. Weston: That's all.

(Testimony of Ernest Norell.)

Cross-Examination

By Mr. Penfield:

Q. Do you remember anything that Mr. Gustafson did say, Mr. Norell?

A. No sir, to be truthful, I don't know,—I don't remember just what he did say.

Q. You haven't got much recollection of what he did say? A. No.

Q. What is your position with the Potato Growers? A. Foreman now.

Q. Where, in the warehouse? A. Yes sir.

Q. Or in the country. In the Warehouse you say? A. Yes sir.

Q. You general foreman there now?

A. Yes sir.

Q. How long have you held that job?

A. Three weeks,—no, it will be. Two weeks, this is going on the third week now. [796]

Redirect Examination

By Mr. Weston:

Q. I believe there is another point I would like to examine this witness on. Were you a crew foreman during the latter part of the 1941-1942 season, that would be the early part of 1942?

A. Yes sir.

Q. And do you recall about the time Mr. Rash, Milo Rash was laid off over there?

A. I was out in the country but I was told about it when I come in.

Q. Did you ever talk to Milo Rash about coming back to your crew after that?

(Testimony of Ernest Norell.)

A. Yes, I asked him if he would.

Q. You asked him to come back on your crew?

A. Asked him if he wanted to go to work, he could go to work on my crew.

Q. What did he tell you at that time?

A. I don't remember.

Q. But he never came back to the job, did he?

A. No.

Q. Well would you have put him on your crew if he had come back?

A. Sure, he's a good friend of mine.

Mr. Weston: That's all. [797]

Recross Examination

Q. (Mr. Penfield) Mr. Norell, you say you were a crew foreman in the country, country crew foreman at that time? A. Yes sir.

Q. Were you in the habit of hiring or firing your employees? A. Yes sir.

Q. How long had you done that?

A. Well, for two years, you hired and fired your own men on your country crew; for two seasons.

Q. Is it your testimony that this hiring and discharging was done exclusively by you and not through the foreman in the warehouse?

A. Well if it was out there I would hire them and if it was around the warehouse Foreman did; I would go up town and get them.

Q. Is that true on all of the country crews, or,—

A. (Interposing) Well, that was the way I did it. Fred Foreman said that it was up to me to get them.

(Testimony of Ernest Norell.)

Q. Had Fred Foreman ever said anything to you about Milo Rash?

A. Well, he might have said something, I don't recall; a lot of talk going on.

Q. You don't recall any conversation with Foreman about hiring Rash? [798]

A. No.

Q. Did he tell,——

A. (Interposing) Oh, he did say if he goes on your crew put him to scooping or something.

Q. He did say that?

A. Yes, but he wouldn't scoop. [799]

Q. (Trial Examiner Barton) Referring again to the City Hall meeting how did you find out that that meeting was to be held?

A. It was told us over to the warehouse.

Q. Who told you?

A. I don't remember but I believe Mr. Hansen.

Q. Mr. Farrel Hansen told you?

A. Yes sir.

Q. Do you remember what he said at the time?

A. There was going to be a meeting over there and he wanted us to be over there.

Q. Who was with you when he told you to be present?

A. I don't remember.

Q. Was anybody with you?

A. Yes, I believe there was, but I couldn't tell you who it was.

Q. How many were present if you remember?

A. Well, there was Alvin Steers over there; Milo.

Q. You mean they were with you at the time?

(Testimony of Ernest Norell.)

A. Yes.

Q. Was that the same day as the meeting?

A. I believe it was. Or the day before, I am not sure just which. I don't remember.

Q. Do you recall whether anything was said at the meeting at the City Hall to the effect that it would be a good thing if the men had their own union?

A. Yes, that was brought up. To tell the truth Mr. Hansen suggested it I believe.

Q. Where did he suggest it?

A. Over to the warehouse.

Q. You don't recall who said anything about it at the City Hall? A. No, I don't.

Q. You do remember that it was mentioned there?

A. Well I wouldn't be too sure but I believe it was.

LEWIS LESLIE WEST

called as a witness by and on behalf of the Respondents, being first duly sworn on oath, was examined and testified as follows: [801]

Direct Examination

Trial Examiner Barton: Be seated. State your full name, please?

The Witness: Lewis Leslie West (spelling).

Q. (Mr. Weston) What is your occupation Mr. West? A. Farmer.

Q. Were you at a meeting on January 24th in the City Hall in this City?

(Testimony of Lewis Leslie West.)

A. Well, I wouldn't swear to the date but I think from the meeting you are talking about why I was there.

Q. Did you hear Mr. Gustafson talk at that meeting? A. Yes sir.

Q. Could you hear everything he said?

A. I was sitting close to him, I think I heard everything he said.

Q. You have been in the court room this morning and heard the statement that was attributed to him? A. Yes, I heard the statement.

Q. Did he make that statement?

A. He did not. [802]

EMIL C. JOHNSON

called as a witness by and on behalf of the Respondents, being first duly sworn on oath, was examined and testified as follows:

Direct Examination

Q. (Trial Examiner Barton) Be seated. Your full name, please?

A. Emil C. Johnson (spelling)

Q. (Mr. Weston) Where do you live Mr. Johnson?

A. I live out in the territory they call New Sweden.

Q. About how far is that from here?

A. It is 5½ mile.

Q. What is your occupation?

A. I am a farmer.

(Testimony of Emil C. Johnson.)

Q. Were you present at a meeting on January 24th in the City Hall? A. Yes sir.

Q. Did you hear Mr. Gustafson give a talk?

A. Yes, I did hear him talk.

Q. Can you remember whether he said anything about running a pitch-fork through Ray Hansen?

A. No, he did not, during the meeting.

Q. Did you hear him make that statement any time? A. No, I did not. [805]

Q. Now Mr. Johnson, I would like to go into just a little different subject. Do you ask for a crew of your own choosing as a rule when you want your potatoes sorted? A. Yes.

Q. So you ask,—make the request for certain crews and they send out certain crews?

A. Yes. [808]

Q. (Mr. Weston) I will ask you Mr. Johnson, what arrangement you have with the packer or shipper with reference to the control and supervision that you are to have over your crew in your cellar; do you have any?

A. Yes, I have, absolute control of the men in my cellar.

Trial Examiner Barton: That hardly answers the question. The question is what arrangement you have with the shipper or packer about.

A. (Continuing) Well, I go in and ask him to send me a crew of men and I generally ask for a crew that has been working for me before, and that I know can do the work, and do it right, and I have only had two sorting crews in the last few

(Testimony of Emil C. Johnson.)

years that I liked real well and I generally get one or the other of them two crews.

Trial Examiner Barton: Does one of them,—do you name the men that are to be on the crew?

[809]

The Witness: No, I don't name the men on the crew. I name the crew,—I name the crew foreman, foreman of the crew and ask for him.

Trial Examiner Barton: And let him bring his own crew?

The Witness: I let him bring his own men.

Q. (Mr. Weston) Well while that crew is in your cellar what do you do with reference to the crew?

A. Well, I work with them on the sorter. I always stay on the sorter and see that their work is packed right and that their,—that they are sorted like the laws call for and if there is a man that isn't doing his work right I just tell the foreman that he will change him or put him on another place and if he isn't satisfactory he will have to send him back to the warehouse and get another man.

Q. And if you are not satisfied with the way the pack was being made would you stop the entire group?

A. Yes, I would.

Q. And that would be agreeable with the shipper and packer, is that right?

A. I should think so. I never asked them about it. I always felt that they were my potatoes and I should have the right to say how, to say how they

(Testimony of Emil C. Johnson.)

are handled. If there is a man that is careless and bruises potatoes I don't want him in there.

[810]

Cross Examination

Q. (Mr. Penfield) You stated, Mr. Johnson, that generally you asked for a certain crew or crew foreman? A. Yes sir.

Q. The personnel of that crew may have varied from time to time, is that correct? [811]

A. Yes, it will.

Q. And you stated you were always present and watched the sorting? A. Yes sir.

Q. Naturally you have an interest in having the potatoes sorted properly, because you are selling them; now when you made complaints about the workers you made the complaints to the foreman, is that it?

A. I made the complaints to the foreman as a rule there.

Q. And,—go ahead.

A. (Continuing) And if they don't,—if I don't get satisfaction out of the foreman then of course I would go to the manager of the Association and tell him.

Q. I see. Usually the foreman will attempt to adjust the complaint? A. Yes sir.

Q. In most instances I suppose he does?

A. Yes, sir; correct.

Q. Can you tell us how many men in the last year you have asked to have a man removed from your crew,—from a crew?

A. No. I have not asked to have them removed

(Testimony of Emil C. Johnson.)

from the crew for many years that I remember of, but I have asked him to change places with them, if they are on certain places on the sorter and I see they don't know their business I asked him to change someone to someplace where it isn't too important. [812]

Q. And you take that up with the manager if the foreman doesn't take care of it?

A. No, I take that up with the foreman.

Q. Have you ever had occasion to take it up with the manager of the company?

A. No; only occasion I have had I have ever had to take up with the manager is getting the foreman, the right foreman.

Q. As a matter of fact you very rarely have any complaint about the way the thing is done?

A. Well, I wouldn't say I have had no complaint since,—I don't believe I have had any complaint since Farrel Hansen was manager. I haven't had any complaints to him. Just a few suggestions to him about things. [813]

Redirect Examination

Q. (Mr. Weston) Just one more question. When these potatoes are bought from you, as a grower, as number one's, or as a certain grade, do you own those potatoes until the grade is made, regardless of where it is made; do you understand that question?

A. Yes, yes. I own the potatoes until they are shipped and in most of the cases my understanding is I own them until they are sold, whether they are

(Testimony of Emil C. Johnson.)

sold on this end in Idaho Falls or on the other end. [816]

Q. So that no matter where the grading is done they are your potatoes, is that correct, still?

A. Yes sir.

Q. And that is why you exercise this control over the way the grading is done?

A. Yes sir.

Q. Trial Examiner Barton: Do you pay the cellar crews when they come out to your place?

The Witness: They are paid out of my expense of the potatoes. I get an offer that it is so much for a carload lot and if I think it is satisfactory I ask for a crew to come out and sort the potatoes and they hold out the money from my money, from the check I get for the sale and it is paid to the crew.

Trial Examiner Barton: Well the wages are paid to the crew by the Association and then deducted from your check or pay that you get for the potatoes from the Association?

The Witness: That is the way, unless I have an extra man working on my sorting crew that I pay. Sometimes one or two on the farm, working on the farm, works on the cellar crew and then I pay them.

Trial Examiner Barton: Did you do that this year?

The Witness: I do that every year.

Trial Examiner Barton: How many men did

(Testimony of Emil C. Johnson.)

you have this year that you paid? This last year?
[817]

The Witness: I usually always had one; sometime two, three or four men.

Trial Examiner Barton: What did they do?

The Witness: They would do anything that any of the other men would do; they were all experienced farm hands and all experienced on the sorters.

Trial Examiner Barton: Do they work on the sorter?

The Witness: Well on the sorter and on scooping and on sacking.

Trial Examiner Barton: You mean they work with the crew?

The Witness: Yes sir. I go in and tell them I want so many men from town and then I fill in the crew out from my place.

Trial Examiner Barton: Are there any other questions?

Q. (Mr. Weston) Do you know whether some of the farmers pay some of the crew?

Q. Yes, I do. They do that.

Q. But you didn't do that this last year?

A. No, I just pay the man who was on my farm and the rest of them are paid through the Association.

Mr. Weston: That's all.

(Witness excused.) [818]

Mr. Weston: I would like to call Mr. Lloyd Holden at this time.

LLOYD B. HOLDEN,

called as a witness for and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct Examination

Trial Examiner Barton: You are the same L. B. Holden who testified here before?

A. Yes, sir.

Q. (By Mr. Weston) Mr. Holden, touching upon this question of your arrangement with the farmer in the purchasing of potatoes, I will ask you, first, if when you buy potatoes from the grower at an agreed price for No. 1's, what is the position of the grower with reference to those potatoes while you are making the grade? Do you understand my question?

A. Well, as a rule, he supervised the grading, that is,—

Q. First, let's take it in his cellar,—who is the boss out there?

A. Well, as a rule when we go into his cellar the grower usually wants to be there. He wants to know when we are coming, and he will be there, or if not, he will have some man take care of it for him; and if the potatoes are bought rough to come in, he wants us to make the grade for him, and we get them in the warehouse, and we take them over the [819] sorter, and whatever we get out of them we put them in the car.

Q. And then who owns the potatoes?

(Testimony of Lloyd B. Holden.)

A. He owns the potatoes until the grade is made.

Q. That is regardless of whether the grade is made at his place in the cellar or at your place?

A. That is the way they are generally bought.

Q. Have you had any experience when the grower has interfered with your grade in your place of business, in your shed?

A. Yes; we have had growers come in and see how the grade is being made, and sometime they would want to know how they are running. Lots of times they will come in after a carload is run and get a check on the No. 1's and No. 2's, and see how they are coming out, to see how much money they are going to get out of them.

Q. Can you give any instance where a grower actually came into your warehouse and made suggestions, or interfered, with the way the potatoes were being graded?

A. We had a grower,—he used to be a dealer, but he is a grower now, where we bought some potatoes from him here some time ago and we sold them to the Safeway Store. Mr. Lamb was the buyer at that time for the Safeway Store, and we were over in his basement running them out, and this buyer stood at the front of the sorter and was what we call [820] “high-grading” them, that is, taking out the potatoes he thought shouldn't go into the sack, and this man told me he thought the buyer was high-grading him.

Q. Who told you that?

(Testimony of Lloyd B. Holden.)

A. The grower of the potatoes, so I went down and told Mr. Lamb that he couldn't do that, that in the first place our crews knew how to make the grade, and if they didn't make the grade they would have to be re-sorted, but we couldn't stand for him standing on the sorter and having difficulty with the grower, because when we got the car loaded he didn't have to take it, it still belonged to us, and I told him I didn't want him to interfere with the crew any more.

Q. Have you any other instance that occurred with some grower in that regard?

A. I had one about eleven years ago, possibly twelve,——

Trial Examiner Barton: I don't know,—I believe that is so far back it would almost be immaterial.

Mr. Weston: Yes.

Q. I will ask you this question, Mr. Holden: Has the same relationship between the grower and the packer, or shipper, existed for several years?

A. Yes; I would say our trading rules are about the same. It is always understood it is the grower's privilege to be there and protect his interests.

[821]

Q. Tell us briefly, very briefly, how this grew up, why these farmers and growers were given those privileges?

A. Well, in this state it seems like it has always been that way. I know when we started in business it was that way, and it has been ever since.

(Testimony of Lloyd B. Holden.)

We find them in high-priced years more so than in the cheap years. However, they are protecting themselves at all times, and to start up a business you have to give them a little inducement to come in. It takes years to build a business.

Q. Does the farmer sometimes call your place and ask for a special crew?

A. Most of the time. They will ask for the crew they like.

Trial Examiner Barton: They do that by simply specifying the crew foreman, I take it?

A. That is true. Your foreman is your manager. However, as a rule most of the men will stay on the same crew, unless they have sickness, or someone leaves for a better job or some other job, but, as a rule, our men stay pretty close to the same. Your foreman, he will have a part of his old men all through the season.

Q. Now, Mr. Holden, were you present last week when Mr. Hendricksen testified?

A. Yes, I believe I was.

Q. And Mr. Moore? A. Yes. [822]

Q. I will ask you to state, please, just what took place with yourself and your foreman with reference to these men being laid off on February fifth? Just how was that done?

A. Well, at that time we had,—our demand was very slow.

Mr. Penfield: Just a moment. May I ask if this question is being limited to just Hendricksen and Willard Moore?

(Testimony of Lloyd B. Holden.)

Mr. Weston: No; the whole bunch, I am asking about.

A. Our demand was very slow, and the men were getting in very few hours. The growers were not selling, and our demand was slow, and we couldn't buy any more at that time, and we had a little outside office just next to the office, and it was the only place that had any heat, and we told them not to come, but they would come any way and they would be laying around, and you could hear them talking about some one would have to go because there was not work enough there for all of them, and they would all be better off if some of them would go. So in picking the men to stay we tried to pick our best men so our crews could compete with our competitors, and we took,——

Q. Just a minute. Let me interject this question here: Do you have any particular system of seniority?

A. Now, we haven't had, just according to them being capable, and also if you pick from different crews, then you also have to pick men that can sort and sew, and you [823] almost have to line up your men according to what you need.

Q. Was this the method you pursued then?

A. In picking the men; yes.

Q. Did you go over it with your foreman, Mr. Metcalfe?

A. Yes, sir.

Q. And you selected the men you thought were perhaps the least capable of the group?

A. Yes.

(Testimony of Lloyd B. Holden.)

Q. And taking into consideration there what particular job they did?

A. What particular job we had available for him.

Q. Did you yourself know much about the characteristics or the ability of these various men?

A. No, sir; I had nothing to do,—that is, very seldom I got to the warehouse; I had plenty of work inside.

Q. You left a great deal of that to Mr. Metcalfe?

A. Practically all of it; yes, sir.

Q. But you did discuss with him the relative merits or demerits of these men, is that right?

A. Yes; in laying them off, for instance, if we had ten sorter men, we knew we only needed four, and you would probably have to change around until you could make the crews come out more uniform, and have men that could do the job that was left for them to do.

Q. Were you present when Mr. Babcock and Mr. Metcalfe and [824] myself discussed these various matters?

A. Yes, sir.

Q. Had he been laid off before, do you know?

A. I really don't know. I think,—it has been a general rule with our boys over there they could come and go at any time, if they could better themselves, and possibly he has been one of the boys who has been there off and on. With those boys who would leave, if they came back and there was a job open they would get their job back.

Q. Was that true with reference to this group that was laid off?

(Testimony of Lloyd B. Holden.)

A. If they wanted to come back and there was work there, they would have gotten a job.

Q. Did you have a conversation with Mr. Moore with reference to that?

A. At a meeting that Mr. Owen wanted the growers to come in,—

Mr. Penfield: I wonder if you would specify which Mr. Moore, Mr. Weston? There are three Moores.

Q. Which Moore did you talk to, Mr. Holden?

A. That was Willard Moore. That was there that evening of the meeting, and he came over to me,—his father had [825] been a friend of ours for years, and we had always bought his potatoes, and he came over during the meeting, or after the meeting, that evening and he said he hoped there was no hard feelings toward his father about this, and I told him there was none whatsoever, or toward him, either, and I would be glad to have him come over at any time.

Q. Did you have employment for him at that time?

A. Well, I really don't know about that, whether there was or not. It was quite slow through February.

Q. Did any of these men ever come back?

A. Never came back, that I know of. [826]

Q. What about Willard Moore?

A. Willard Moore was one of the youngest men on the crew. Due to his coming back,—if I remember right he left in February and came back in

(Testimony of Lloyd B. Holden.)

November or December the following years, and he was only there a short time.

Q. What about his work with reference to his speed, or slowness?

A. Well, I think Willard was a good boy, and was thorough, but a little slow on the table, possibly.

[827]

Q. Now, this method employed by you and Mr. Metcalfe, is that the usual way you two go over the question of lay-offs, Mr. Holden?

A. Yes, as a rule,—we have no set rules, but lots of times he could come over and say we have got too many *me*. I have heard it around the warehouse, and some of them know they have to go, and we would generally pick them according to their ability, and what places we had open for them.

Q. Was it necessary at that time to lay off some men?

A. Yes; it was. In fact the boys that stayed got very little work for some time after, because we didn't have the work to do, and I think some of the boys that left got better pay after they left. We had one man that came to us and said he could pick up work with some other dealer here, and he left and worked for a while and came back. [829]

Q. With reference to union membership, did you know at that time who was in the union, over there, and who was not?

A. No; we didn't know who was union. We heard most of them were in the union, but I didn't

(Testimony of Lloyd B. Holden.)

know who was in or out. I never discussed it with the men either way, for or against.

Q. But you understood they were practically all in the union?

A. We understood they were practically all in the union; yes, sir.

Q. In laying off these men, did you in any way discriminate against the union?

A. No, sir; in no way at all. [830]

Q. Now, another subject, Mr. Holden: With reference to the meetings of the members of the Traffic Association on [832] Mondays, can you tell us your understanding of my relationship to the group that met there?

A. Well, my understanding was that you were the lawyer for each individual dealer. That is what I thought you were,—for us, any way, and so far as the amount of people that were there, part were members of the Association and part were not. It was more or less an open meeting, and the railroad boys came, and the bag boys came, or whoever was in town at that time.

Q. Did we ever have any meeting of the Association where this matter was discussed just among Association members?

A. I don't remember of a time when it was Association members, only.

Q. What part did I usually take in those programs on Mondays, when I did take part?

A. Well, I think you listened most of the time,

(Testimony of Lloyd B. Holden.)

and maybe reported, if there was anything to report, how you were getting along.

Q. What was your understanding with reference to my position on negotiations, or making contracts?

A. Well, I think my impression was that as soon as you got something good to work on you would report back, and that you were at all times,— I think we all had it in the back of our minds that we would negotiate.

Q. And I made reports to you from time to time on my [833] progress? A. Yes, sir.

Q. Do you recall at the first meeting I attended whether or not any question was raised as to whether the Association should handle these matters?

A. Oh, no; I believe you said at that time that the Association should have nothing to do with it; that each individual case would be handled separately. [834]

Cross Examination

By Mr. Penfield:

Q. Mr. Holden, with respect to these farmers and sellers, they are to you customers, are they not?

A. Yes; they are; that is our livelihood.

Q. And you more or less have to conduct your business so you can satisfy them?

A. Yes, sir.

Q. And that really is the relationship between you, isn't it, one of customer and seller?

(Testimony of Lloyd B. Holden.)

A. Yes; we have to get along with the grower, or we don't have any business.

Q. Now, with respect to these lay-offs on February fifth, who actually made the decision as to the men to be laid off, Mr. Holden, did you, or Mr. Metcalfe? [836]

A. As I told you, Mr. Metcalfe,—any time the men came in for work I sent them to him and he had the authority to place them. However, on this lay-off, I believe he did come and talk to me about it and asked me to pick the men to be laid off.

Q. Were you pretty familiar with the work of the various men working for you at that time?

A. Well, I was in and out of the warehouse. I wasn't most of the time in the warehouse, but I was in and out of there several times each day.

Q. How about the country crews?

A. I took trips to the country, too.

Q. Not very frequently, did you?

A. Whenever I could get away to run out, I did.

Q. As a matter of fact with respect to the country crews, the man who was most familiar with their work was the crew foreman, wasn't he?

A. Possibly, yes. He would be there all the time.

Q. You didn't consult with the crew foremen in this lay-off, did you?

A. Well, on changes around, most of the time we don't consult with them.

Q. They are the ones that know the most about the work of the men on the crew?

(Testimony of Lloyd B. Holden.)

A. Well, I would say they are good boys, but they don't [837] always know the most. Lots of times a crew foreman possibly wouldn't open up and let you know what was going on, where you couldn't see it, and unless you saw it he probably wouldn't mention it.

Q. It is possibly true you wouldn't always accept the judgment of a crew foreman, but didn't you generally consult them with respect to lay-offs?

A. Not always; no. We had no set rule of laying off and putting on,—just as we needed them.

Q. As a matter of fact, you did consult Mr. Clifford Moore with respect to the December lay-off, didn't you?

A. Possibly so. I really don't remember.

Q. But you didn't consult him with respect to the February lay-off, did you?

A. Well, I don't really remember whether we did, or not.

Q. When you and Mr. Metcalfe were going over this question of lay-offs, did you consult your records as to the length of service of these various men?

A. We never had,—

Q. Will you just answer my question. I am asking you on this specific occasion?

A. I think we took into consideration the boys that would fit into the picture the best, and we tried to keep the best men on the job.

Q. Did you consult your records as to the length

(Testimony of Lloyd B. Holden.)

of service [838] these men had worked at that time?

A. I don't know as we did. We hadn't at any other time, either.

Q. But you didn't, at this time?

A. I don't believe we did, because these men were coming and going as they have always done, as they felt like going. [839]

Recross Examination

By Mr. Penfield:

Q. Mr. Holden,—there is one matter I overlooked before,—you testified in connection with these luncheon meetings of the Traffic Association, and I believe you stated that Mr. Weston was retained as lawyer for each dealer. Isn't it true you made your payments to Mr. Weston through the Traffic Association?

A. I believe most of my checks were made out to Mr. Weston,—I couldn't say without looking, but I believe they were.

Q. They were in connection with the negotiations?

A. The negotiations is all we ever used him for, to negotiate for us.

Q. Do you recall making any payments to Carl DeLong for the purpose of paying Mr. Weston?

A. No, sir; I haven't that I know of. We have a membership fee we send in each month, but that is just for the upkeep of the office itself. [853]

Q. Now, with respect to these wage increases,

(Testimony of Lloyd B. Holden.)

Mr. Holden, you made a number of increases during the 1941-1942 season, did you not?

A. I really don't know how many. I think we were at forty or forty-five at one time, and raised to fifty.

Q. What is your minimum rate now?

A. Our boys all get eighty cents, with the exception of the crew foreman. We only have two or three, or three or four of those,—I don't know just how many.

Q. That is considerably higher than the rate which was originally asked for in the Union contract, is it not?

A. Well, I don't remember exactly what was asked for. I believe it was seventy-five or eighty-five cents, or from sixty-five to eighty cents,—I am not sure which it was.

Q. And,—

Mr. Weston: We would like to interpose an objection to that question. It is immaterial, and besides, the record shows what the contract calls for.

Mr. Penfield: It was my intention to show him the [858] record. That was my point in asking him that. I realize he doesn't probably recall.

Trial Examiner Barton: Well, if you want to use the contract to refresh the witness' recollection, that is proper. However, if you merely want the record to show what the contract shows, that is already in the record.

Mr. Penfield: Well, I want to use it to refresh

(Testimony of Lloyd B. Holden.)

his recollection so I could ask him some further questions.

Q. I show you Board's Exhibit No. 38,—

A. This grader man, that is, the man on the grader, I suppose. Grader man, I suppose it would be. Your grader men are practically one-half of your country crew. You would have four grader men and possibly eight to nine sorters.

Q. As a matter of fact, you have very little differential in wages on your work, isn't that correct?

A. That is correct; yes, sir.

Q. With the exception of the crew foreman?

A. With the exception of the crew foreman; yes.

Q. They are all paid the same?

A. Yes, sir. In fact, if you will have a vote among your men, they would rather have it that way.

Q. Well, it is true that at the present time you are paying higher wages than that contract called for?

Mr. Weston: We object to that as calling for a conclusion of the witness. [859]

Mr. Penfield: I don't think so.

Trial Examiner Barton: If he knows, I will let him state.

A. Well, if that is your rate there, I would say about one-half of your men would be getting seventy-five cents against eighty now; yes, sir.

Q. There has been considerable testimony to the effect that at the time the Union contract was first

(Testimony of Lloyd B. Holden.)

presented there was considerable furor stirred up among the farmers, and they were quite incensed because their costs were going to be raised, naturally. Have you ever consulted with the farmers in regard to any of these wage increases?

A. Well, the growers consult with us at all times. They are in and out, calling in.

Q. Have the farmers ever objected to this steady run of increases that have finally brought the costs,—the amounts sought higher than those set forth in the Union contract? [860]

A. I think, in the mean time your growers,—his own costs have increased to the point where he possibly realizes it. However a lot of them don't know why they have to pay so much in between their costs and the prices we have to get for them.

Q. But you have made these increases without consulting the farmers, isn't that correct?

A. Well, a lot of boys we use are farmers' boys, and the farmers own the potatoes.

Trial Examiner Barton: Let's consider the increase you recently have made, in September or October,—now did you confer with any growers before you made that increase?

A. Well, not necessarily, unless it would be some grower we were washing some stuff for, and he would pay the bill, then it would cost so much or more, and there was times we [861] would run his seed potatoes for him.

Trial Examiner Barton: Then any conferring you did was after the increase had been made?

(Testimony of Lloyd B. Holden.)

A. Possibly so.

Trial Examiner Barton: And would that same answer apply as to any other increases you have made, say, since the first of the year?

A. Yes, I think possibly so, because it was a matter of either paying the increase or losing the men, because they had other places to go where they could get a lot more than they are getting now, but we still have lost a lot to defense plants and other places.

Mr. Penfield: I have no further questions.

Redirect Examination

By Mr. Weston:

Q. What is the usual work week over there now, Mr. Holden?

A. We have fourteen weeks of no limit and fourteen weeks of fifty-six hours, and the balance of the time is forty hours.

Q. What is the average length of the work day over there?

A. It varies from in Harvest time, possibly from twelve hours,—oh, it is according to when you start in the morning. Now, I would say our work day would possibly be nine hours, during harvest time. It runs longer than that. That is why we have no limits. Some of the boys would get considerably more time than that during harvest time.

[862]

Q. Taking into consideration the time and a half for overtime, have you ever figured what that would increase your hourly rate?

(Testimony of Lloyd B. Holden.)

A. During our harvest time, it would increase it considerably, because some of the boys who are getting fifty to fifty-five dollars a week now during the harvest time, with the overtime it would run probably eighty to ninety dollars, or sixty to seventy dollars,—I haven't figured it out,—sixty to seventy dollars a week, possibly.

Q. It would be an increase of practically forty dollars a week?

A. At eighty cents an hour, it calls for \$1.20 an hour on overtime,—you would have forty cents an hour increase there.

Q. When you answered Mr. Penfield's question as to whether you are now paying more than the contracts call for, you didn't take that into consideration?

A. No, sir.

Q. And if you did take that into consideration would you be paying more than the contracts call for?

A. I don't believe I would. [863]

Recross Examination

By Mr. Penfield:

Q. Mr. Holden, regardless of whether the increases are, or are not equal to, greater than, or less than the amounts set forth in the contract, it is still true these increases have raised the costs for the farmers, is that not true?

A. Yes; I suppose it would have to come off of the farmers in the end; yes.

Trial Examiner Barton: One or two questions, Mr. Holden: There has been considerable testimony

(Testimony of Lloyd B. Holden.)

here about the L. S. Taube & Company shed in Shelley?

A. Yes, sir.

Q. Am I right that the shed there and the one in Idaho Falls are the only two the company has?

A. Yes; the only direct packing. We buy loaded cars, but that is the only packing sheds we have.

Trial Examiner Barton: What is the size of the Shelley [864] shed compared with the one in Idaho Falls?

A. You mean the size of the building?

Trial Examiner Barton: Yes.

A. I would say,—I think it is eighty by forty, and this is one hundred and sixty by sixty.

Trial Examiner Barton: And how does the volume of potatoes that go through that shed compare with the volume in this one?

A. We would have more here than there. However, down there it runs from two to four hundred cars a year, according to the season.

Trial Examiner Barton: And here it runs what?

A. Here, possibly from six to eight,—from five to eight hundred, according to the year, how general production was.

Trial Examiner Barton: How many country crews do you have working out of that shed at Shelley?

A. At Shelley, he generally works one crew. He splits the crew and goes out with two crews at a time, as a rule. Sometimes it doesn't last but a few days, and if he is in the country and has any dirty

(Testimony of Lloyd B. Holden.)

potatoes to be washed, he brings both crews in to do it in one operation there.

Trial Examiner Barton: And how would that compare with the number of crews working out of this shed?

A. Well, I would say, as a whole, it would be about half as many. [865]

Trial Examiner Barton: What would you say about the number of men that work in the two sheds in the rush season in the fall? How would they compare?

A. I imagine,—I would say about twenty-five to fifty,—twenty-five down there, possibly about half.

Trial Examiner Barton: You have used the pronoun “he,” several times in reference to Shelley. To whom do you refer by that?

A. That is my foreman down there. That is Leland Wright.

Trial Examiner Barton: What power does he have there?

A. He hires and fires, and he buys the bulk, and he supervises the operation there.

Trial Examiner Barton: Does he communicate frequently with your Idaho Falls plant?

A. Yes; he calls me every day any time anything comes up of any importance. We always talk many times a day.

Q. Can you explain what you mean by “matters of importance?”

A. As to buying, or if the grower comes in, and

(Testimony of Lloyd B. Holden.)

if he has any orders to be filled, he will possibly call up and see if it is all right to buy them.

Trial Examiner Barton: Do you ever get crowded for help and call upon the Shelley warehouse?

A. Very seldom.

Trial Examiner Barton: And does it very [illegible] the other way around? [866]

A. Sometimes it is the other way. Generally, if we have potatoes between here and Shelley and the Shelley crew is not busy we have them go and get them to put them to work instead of having them lay off, and we do the same thing with our crews, where we work down that way.

Trial Examiner Barton: Would your foreman at Shelley have the same powers, substantially, that Mr. Metcalfe has here in Idaho Falls?

A. Yes; he would have. In fact on his men and his operations he would have the same.

Trial Examiner Barton: I am still a bit puzzled about the February lay-offs. I am not clear as to who really made the decision as to those lay-offs.

A. Well, where you have a lot of men,—and I don't suppose unless you could see a crew run you would have any idea as to how it works, but there is certain men who can do certain jobs, and if you lay off some men you have got to change all the way around to have a uniform crew again, because if you had ten sewers, and maybe no men for sorters, you would be out of proportion. You

(Testimony of Lloyd B. Holden.)

have to pick them according to what they can do.

Trial Examiner Barton: Did you instruct Mr. Metcalfe what men were to be laid off in February?

A. Mr. Metcalfe,—when?

Trial Examiner Barton: In February? [867]

A. Mr. Metcalfe checked it over, I think, and tried to pick his efficient men, and laid off the men who didn't work into the picture and couldn't take the job available for him, and I think he did come to me and ask me something about it.

Trial Examiner Barton: Do you discuss each man individually before these lay-offs?

A. Well, we discussed them as to whether or not they could work and what job was open for them, and the men all knew they had to be cut down, because we hadn't enough work for the men left even after the lay-off.

Trial Examiner Barton: How was this done? Did you ever suggest to Mr. Metcalfe that he lay off certain men, or did he say, "I want to lay off certain men?"

A. As I remember he came in and said the boys have had more or less discussion and some of them knew there wasn't enough work for them, and I told him, I said, "Well, try to pick us efficient men, and the ones we can spare the least, the ones that do their work," and I think at that time he just made his list accordingly,—or made his selections at that time.

Trial Examiner Barton: Did he tell you before

(Testimony of Lloyd B. Holden.)

he laid them off which ones he was going to lay off.

A. I don't know as he did tell me.

Trial Examiner Barton: You didn't find out until afterwards then? [868]

A. Well, there was some discussion,—I wouldn't say for sure, because I don't remember,—but there was some discussion there as to who would go. I knew some of them had to go, and they knew themselves there were too many there, and we were trying to make the crews,—round them out where we could get efficient work out of them.

Trial Examiner Barton: There were some lay-offs in December, too, weren't there?

A. I believe there was.

Trial Examiner Barton: I remember there was,—I don't remember the men especially.

Trial Examiner Barton: But you do remember the fact there was a lay-off?

A. Yes, sir.

Trial Examiner Barton: Do you recall whether Mr. Metcalfe consulted you before those lay-offs, or not?

A. I believe he did. I am not sure, but I believe he did, because when matters come up there lots of times he will ask my advice on it, of course.

Trial Examiner Barton: Do you recall whether any of the crew foremen were consulted at that time?

A. Well, I wouldn't remember, but I was here the other day when Mr. Moore said he spoke to me about it. Sometimes when I am there and the fore-

man comes in, sometimes he comes in and sometimes they don't. [869]

Afternoon Session

Mr. Weston: Mr. Farrel Hansen, will you take the stand, please?

FARREL L. HANSEN

having been previously sworn and testified was recalled by the Respondents and examined and testifies further as follows:

Redirect Examination

By Mr. Weston:

Q. Now Mr. Hansen, I believe you testified some time during this hearing with reference to your cooperative operation being somewhat different than the others. Will you go into the question a little further as to the difference between your operations and the independent packer, particularly with reference to the control or responsibility of the grower himself?

A. Well, our potato marketing Association is formed and operating under the cooperative laws of the State and of the United States and this provides that the ownership of the assets are with the members. No individual owns more than his proportionate share. Each member has only one vote, regardless of the patronage he gives the Association. The plan provides for an election of a Board of Directors, nominated, and ballotted upon

(Testimony of Farrel L. Hansen.)

by the membership, who are charged with the responsibility of taking charge of the operations and any other business of the Association. [874]

Q. Now how is,—who owns everything that the Association has?

A. The members or patrons of the Association.

Q. And what are they, are they farmers or growers?

A. Well, they have got to be producers or farmers.

Q. You have to be a producer or a farmer to belong?

A. That is correct.

Q. And who do you really work for?

A. Well, I really work for the farmers.

Q. Now, who owns the potatoes that are processed or packed by you people? [875]

A. The farmers.

Q. And how long do they own them during that process?

A. Well, they own it until it is accepted by the purchaser.

Q. Now, you heard the testimony of Lloyd Holden with reference to the position of the farmer in his cellar with relation to the crews; is that substantially the same with reference to your operation?

A. I would say it was substantially the same. However, I feel sure that the members of our Association take more of a personal interest in labor and personnel problems that does occur in Mr. Holden's case, or any of the other shippers.

(Testimony of Farrel L. Hansen.)

Q. In other words, what you are doing is packing and shipping potatoes owned by your own members and they own the equipment that is packing them?

A. That is correct. They feel a little more of an interest in it. By further explanation, every day almost I get suggestions or criticisms from growers with reference to their opinion as to the ability of individual workers who might be working on the sorters in their cellars or who might be working in the warehouse. Quite often will,—growers will come in the warehouse and watch our operations and offer us or myself or my assistants under me some suggestions as to how we can improve our service or method of operating, or suggest a man who might be doing an exceptionally fine job and they remind me of it, which would encourage me to promote him to a better [876] job if one was available and of course it would work the other way too, if we had a man in a responsible position who might be failing to do the job, if a grower felt that he should not be doing it but should have a better man we would act on that and then I have had recommendations that he might be transferred or talked to in order to get him to improve the caliber of the service he is rendering.

Q. In other words your members exercise a little more control or more suggestions than others do in the individual operations?

A. I am sure that is true.

(Testimony of Farrel L. Hansen.)

Q. Approximately how many members have you?

A. Approximately 700.

Q. Now, if a grower came in your warehouse here in Idaho Falls and was not satisfied with the way the pack was being made, could he stop the entire operation?

A. Yes. If they were working on his potatoes he would have the authority to stop the operation.

Q. In other words you buy,—do you buy these things like the others do? A. No sir.

Q. You don't buy them at so much for number one grade? A. No sir.

Q. You have the farmers bring in their crop and pack it and sell it on the market for them?

A. Well, to explain, I get an order on a car of potatoes, [877] for example, take at Atlanta, Georgia, we sell quite a bit of potatoes into Atlanta. When we get an order I figure out what they offer, what their offer is loaded on the car f.o.b. Idaho Falls. I will contact the grower, tell him what that order figures out on and if he is,—wants to put his potatoes on that order and they are suitable in quantity, then we place his potatoes on the order. We invoice the potatoes according to the sale and deduct from the sale what it costs to pack them and prepare them and load them for that order.

Q. So that that particular shipper pays the exact amount that you had to pay for labor and expenses?

A. The grower does.

Q. As is figured against him for that particular shipment?

(Testimony of Farrel L. Hansen.)

A. That is correct. I might mention too, Mr. Weston, that we have,—well, as illustrated by Mr. Johnson I believe, this morning; we have some growers who pay for this operation with their own check. Others, and in most cases, we deduct it from the account sale and that we render them on the sale that was made on their potatoes.

Q. Now, coming down to these meetings that were held in January, 1942, do you know who started those meetings or who conceived the idea of having them? What information can you give us on that?

A. I don't believe that anyone or any group took the initiative in promoting or calling these meetings. I am sure from [878] the information that I have and the experience that I went through it was as the result of common information and common knowledge existing in the community. In our particular case when this question of organization of our workers into the union came to my attention, with the suggestion that it would involve considerable change in working conditions and wage scales, I called my Board of Directors together and gave them all of the information that I had. As a result of that conference with the Board I am sure that they in turn contacted other growers belonging to our Association to ask them what they thought about it, and what their ideas were, and it wasn't long until I was snowed under with phone calls and personal visits from farmers in the areas we operate in asking us,—in asking me, what I knew about it and what was going to happen.

(Testimony of Farrel L. Hansen.)

I gave them what information I had and I didn't hesitate to tell them that I thought they ought to take an interest in it and acquaint themselves as much as possible with the procedure so that in the future it would,—in the event it would come to a question of sitting down and reaching an agreement, they should be prepared to enter into those negotiations.

Q. Now, you were raising potatoes at the time, were you not? A. Yes.

Q. I believe you have already testified that you are a grower and a member of the Grange? [879]

A. That is correct.

Q. Now, isn't it a fact that along about this time the cooperative creamery here was negotiating with the Union too?

A. I couldn't swear as to whether or not they were negotiating or as to just what stage it had reached, but I do know the same question was confronting the creamery as was confronting the Association.

Q. Do you know whether that question confronting the creamery association preceded yours or not?

A. It preceded ours.

Q. That was a farm organization, also, was it not? A. Yes sir.

Q. Do you happen to know how many members there are in the creamery association?

A. Well I belong to the creamery association myself and as I recall the last statement it was somewhere around 3000 members.

(Testimony of Farrel L. Hansen.)

Q. You are,—they are all farmers, also?

A. Yes. And a great many of the farmers that are members of the creamery association are also members of the Potato Growers Association.

Q. As a matter of fact, Mr. Trask who has been mentioned here is one of your members?

A. Mr. Trask is the manager of the creamery association and he is also a member and a Director of our Association. [880]

Q. Now, what is your understanding of the basis upon which I was retained in this case?

A. Well, my understanding of your relationship in this connection with our Association was that you were working for us.

Q. You are talking now about your Potato Growers?

A. About our Potato Growers Association. It has been the understanding of our Board of Directors that due to the fact that our operations were somewhat different basically than the individual operators; it would be advisable for us to proceed with our consideration of union organization on our own basis and that we complete our problem and the problems incident to that belonging to ourselves.

Q. Did you ever understand that the Idaho Traffic Association retained me as their attorney?

A. No sir, that hasn't been my understanding.

[881]

Q. Will you tell us just what instructions you gave to the foreman with reference to Milo Rash

(Testimony of Farrel L. Hansen.)

being laid off or demoted or put on to a different job?

A. Yes, I will be glad to do that. It was not my instructions to the foreman, or my foreman, to discharge Mr. Rash or to necessarily demote him. I told Mr. Foreman that due to the light volume of shipments going through our organization it was [882] necessary for us to condense our operations and reduce the number on our payroll. I pointed out the fact to him that we were shipping less than half of the potatoes at that particular time than we were in the month previous and that it was absolutely necessary if we were going to stay in business to reduce those charges or they would be so high we wouldn't be able to get any potatoes from the growers to handle.

In the warehouse we had the foreman, and we had the assistant foreman; we had the bag man and one or two other helpers. I don't know just what their names were but I know they were working at various odd jobs and I told Mr. Foreman that it would be necessary for them,—for him to arrange the work in such a way that one man could do what two would be required to do when our volume of shipments were heavier.

Q. Was this job of bag man one of the recently created jobs there?

A. No, I wouldn't say that it was particularly recent. However, it is a job that was created after I went over there as manager.

Q. Why was it created?

(Testimony of Farrel L. Hansen.)

A. Oh, it was seen there was an apparent necessity to keep track of our bags so that the growers would be equitably charged for the service that was given them in bags and to keep the identity of the bags properly separated so that the grower that owned his bags would be sure to get those bags back again. [883]

Q. Now, just what were your instructions to Foreman with reference to Milo Rash?

A. I told him that I was sure that Lester Long, who is the assistant foreman, could do the work that he had been doing, and take care of the bags also while our volume of business was so light. I am sure in addition to that I instructed him to use every effort with every other employee to pursue the same policy. I remember one day I told him that if our volume continued to drop as it was there would be no question but what it would be necessary for him and our field foreman to work on the sorter.

Q. Was that along about this same time?

A. Yes, that was at the same time.

Q. Now, you heard the testimony here of Norell, that he had offered Milo a job on his crew. Was that agreeable to you?

A. Absolutely it was. I however did not know that that had occurred and that was not specifically according to my instructions, but it was entirely agreeable.

Q. What did you tell,—what did you tell the foreman further with reference to Milo working there; anything?

(Testimony of Farrel L. Hansen.)

A. Well nothing specific, other than we discussed it I think after Milo had refused to work and quit and that I was sorry to see him go in a way and I was disappointed that he took that attitude.

Q. And then what did you say to your foreman, anything? [884]

A. No, I don't recall of saying anything specific in the way of instructions. I *hoever* talked to Milo on two different occasions after that.

Q. Tell us what those conversations were?

A. I talked to him in the Bonneville Hotel, at which time I explained again to him how necessary it was, by the nature of our business, to be prepared to contract our operations and to expand our operations in proportion to the volume of business that is being handled and if you will take the job or whatever job is available over there for you now during this period of time you can start to work in the morning. Well, he said he wanted his old job back; he needed that and he had done it and that he was fitted,—or, he didn't say that was the job he wanted; and I said that as a policy that I was working under the Board of Directors and I said that if it would be necessary to find something as easy as that job or set up that job, in a special category to put him in it, while doing such a small volume of business I would have to take it up with the Board of Directors and find out if they would do it, which I doubted they would. On another occasion I held a meeting with our employees I believe in, soon right after that time and I called

(Testimony of Farrel L. Hansen.)

the employees together to talk to them, and talk over with them the advisability of letting Ed O'Neil come in and conduct some of his potato operations in our basement; as he had had a fire over there which had [885] destroyed his warehouse and his equipment and he had potatoes out that needed handling and I thought it would be a neighborly thing to do to let him come in and work there until he could find suitable quarters to come in to and bring his men in our warehouse to help him out during this emergency.

That was the purpose of the meeting. Milo asked me before that time if he could attend and I told him "yes," and after we had finished discussing the O'Neil matter Milo told me, "Well," he says, "I am a member of the grievance committee," and he says he would like to know where I stand and, so that do you know whether or not somebody should be elected to take my place on this committee." And I said, "Milo, my position is just the same today as it was when I talked to you over in the Hotel room. If you want to take what work is available for you you can start to work any time." "Well," he says, "at what job?" And I says, "Any job that you will fit into that you can do the best." He indicated that he wouldn't take certain jobs and I says, "Do you think Milo that you are better than any of these other boys,"—there was 75 of them standing there,—"that look perfectly good to me," and I said "I don't think you should take that attitude." And I explained

(Testimony of Farrel L. Hansen.)

again to him our position with reference to the necessity to get by with a smaller number of men while our volume of business was lighter and he became very sarcastic and he said, "I feel sorry for you, in fact, I feel so sorry I think [886] I will pass the hat right now to get some money to help you out," and I said, "Milo, if that's the attitude you take and that is the spirit you have you can just as well start looking for a job someplace else, because you wouldn't fit in here." That is what we said.

Q. You heard Swede Norell testify he offered to get,—or to give Milo a job on his crew; did you know about that? A. No sir.

Q. Was that permissible with you?

A. Yes sir, absolutely. Those boys have the authority to employe and discharge such men that work with them on their crews.

Q. I believe he also testified that the foreman had suggested that they put him on a scooping job; Can you think of anything that would have made the foreman have a little different attitude toward Milo than you had? [887]

The Witness: Yes, I do have.

Q. (Mr. Weston) What occurred?

A. Mr. Harold Wood, of the Hanson and Wood company here in Idaho Falls purchased a carload of potatoes from me to be loaded at our Idaho Falls warehouse. The provisions of the sale were that he was to furnish his own bags. He brought those bags over and left them there to be filled. He told

(Testimony of Farrel L. Hansen.)

me and also Mr. Foreman that he had turned them over to our sack man. Mr. Foreman knew from the orders on the book that they were to be packed in his bags.

When the order was to be prepared, Mr. Rash failed to bring the bags out and make them available to the crew at the time their order was prepared.

Q. Was that one of his jobs?

A. Yes sir. In fact, he is the one that Mr. Wood turned the bags over to. As a result of that we had to reload part of the car and take them out and re-pack them and put them in his sacks and make an allowance to Mr. Wood for our failure to comply with the terms of the sale. I was provoked with Mr. Foreman for the reason of balling us up and he in turn blamed Mr. Rash, because he failed to perform his part at this particular time and I believe that would have a bearing on his attitude.

[888]

Q. Now, in the complaint, sub-section 2 of paragraph 12,—I show you sub-section 2 of paragraph 12 of the complaint, where there is alleged among other things that the Respondents in conversations and meetings with Potato growers, farmers and representatives of various Granges, criticized and condemned the union and the proposed collective bargaining agreements which had been presented to Respondents by the Union, and invited and encouraged said persons to assist them in opposing,

(Testimony of Farrel L. Hansen.)

defeating and disrupting the activities of the Union; did you ever do that?

A. I don't know whether you would interpret what I did as being that or not; I would be glad to describe to you what I did and you can draw your own conclusions.

Q. You tell us just what you did in that connection?

A. I have said repeatedly and it has been my policy, that while,—that I was not prejudiced against the unionization of our workers. I have questioned repeatedly, and still question, the leadership that has been available and has been made available to guide the policies of our employees as not [890] being qualified to do that in a way so that it would not actually damage, rather than to help them. At the Grange meetings I attended; at the employees' meetings we held in our warehouse, I have repeatedly said that I do not object to any of our employees joining the union or organizing. I have recognized the fact that good could be obtained through proper guidance in that direction. I have told them that they should be careful in considering their policies so that they would not create working conditions which would make them work less time and actually get less money than what would be available if they were more careful and used judgment as to what their decisions and requests were.

In addition, to that, of course, I think I have testified previously that I have urged the growers

(Testimony of Farrel L. Hansen.)

and the farmers repeatedly and still am, to put themselves in position to properly represent their interests in the case of cases where any costs or wages were under consideration that would affect the prices they receive for their potatoes. Our growers in this area, in fact, in the entire State of Idaho, are highly disorganized. They do not have any common means by which they would be in position,—unless they would provide it,—to sit down and be properly represented at any negotiations with the unions or the unions' agent.

I think that they should be. I think that that is American. I think that otherwise it would be taxation without [891] representation. And I don't think that is good Americanism.

That would be an over-all statement of what I have done and what I have tried to explain at all of these meetings I have attended and through my activities as manager of the Potato Growers.

Q. Did you have any objections at any time,—I will withdraw that question. What did you understand was my function or job in representing or reporting back to you at these meetings,—Monday meetings?

A. I considered it that it was your job and your responsibility to keep me posted and my Board of Directors posted on what requests might be made on the part of the agents of the Union and to keep us also advised as to what our legal responsibilities were and perhaps what our moral responsibilities

(Testimony of Farrel L. Hansen.)

were, judging by other experiences you have had in your contacts with union agents in other areas.

Q. Did you at any time ever object to my bargaining with the Union as your representative?

A. No, I don't recall that I did. However, I believe that I have repeatedly urged you to use your efforts to get the growers in on any conference that was held. If that wasn't done I perhaps might have cautioned you not to take the steps until such time as the growers could be made a party to those negotiations. [892]

Re-Cross Examination

Q. Now, with respect to Mr. Rash, did you instruct the foreman in connection with Mr. Rash when you decided that you had to get rid of an employee and did you mention Mr. Rash directly or did you consider anybody else?

A. Well we considered his job and him, by virtue of the nature of the job he was performing, he came in for a special discussion.

Q. And you then instructed Mr. Foreman to tell Mr. Rash that his job was through? [895]

A. I instructed Mr. Foreman to tell him that it would be necessary for him to take some other work for the time being.

Q. What other work?

A. I didn't specifically mention the job. He had worked at many other jobs in the past in our organization. I felt he would be qualified to fill several kinds.

(Testimony of Farrel L. Hansen.)

Q. There were plenty of jobs in the warehouse he was qualified to fill, weren't there?

A. Oh, I think so; Oh yes, I am sure there would be be several there. There is one point I think should be mentioned, however, in considering this from a fair light. It is my contention that this adjustment would be only until such time as the job he was on would justify having a man on full-time again, and if I had been in the foreman's place I think I would have encouraged Milo to stay on, not to disrupt the organization in the warehouse; but to stay on the sorter possibly for two or three weeks that it might have been necessary to put him on such other work.

Q. Were there other jobs in the warehouse held by younger men than Milo?

A. I can't recall right now. Our volume of business had dropped way down then.

Q. Did you make any check and go into your records to ascertain whether there were less experienced persons holding jobs in the warehouse which Milo was capable of holding? [896]

A. Well, yes. I had an over-all knowledge of the details incident to the conduct of practically all the jobs, even,—of all the jobs that we have over there.

Q. Is it your testimony that there were no employees at that time with less experience than Milo Rash?

A. It would be my testimony that the jobs that might be available for him in the warehouse would

(Testimony of Farrel L. Hansen.)

be less desirable than some of the others that perhaps would have been available for him I will say in the country.

Q. Well that isn't answering my question. Were there any jobs in the warehouse which Milo was capable of doing, which were at that time held by less experienced employees, if you know?

A. Well I don't quite understand, frankly, just what you are trying to accomplish and what information you know, or have. Now could you mention the specific jobs over there?

Q. Well you think that isn't particularly important, as I am asking you the question, as to what I know. My question is clear and what my purpose is is not,—

A. (Interposing) I think it is important because I can see my own picture of it over there and I know what those jobs are; if you will tell me the job you know about,—because I have jobs that I put one of the boys on for maybe 30 minutes at a time and some for maybe an hour at a time and they are through with that and they may be sweeping the floor, maybe [897] cleaning up or straightening something, moving boxes and he might do two or three different jobs that way; there are any number of jobs of different kinds over there Mr. Penfield.

Q. Do you know of any jobs over that Milo was not capable of handling?

A. Oh yes, I think I could point out one or two. I don't believe Milo would be qualified to sew

(Testimony of Farrel L. Hansen.)

sacks, due to the lack of experience; I don't believe Milo would be qualified to make the grade as head grader in the warehouse.

Q. Aside from those is he qualified to do every job in the warehouse?

A. I would say aside from those he perhaps could, yes.

Q. And there were jobs in the warehouse at that time that were occupied by less experienced people than Milo, at that time?

A. Less desirable jobs.

Q. Well there were jobs?

A. Yes, I presume so, I couldn't give you the names of the individuals right at this time, but I rather presume that that would be true.

Q. Milo was never offered any other job in the warehouse?

A. I can't tell you that. Now my instructions to Mr. Foreman, who is the foreman of the Idaho Falls plant, was to put Milo on some other work,—to tell him we were not going to continue,— [898]

Q. (Interposing) As a matter of fact he was given his check on this day he told him his sack job was over?

A. I can't tell you that, I don't know.

Q. You write the checks? A. No.

Q. Do you sign them?

A. Not all of them, no; our auditor and book-keeper over there does most of that.

Q. You never actually offered Milo any specific job, did you?

(Testimony of Farrel L. Hansen.)

A. I think when I was talking to him in the Hotel I probably mentioned two or three jobs that he might have taken, as I recall our conversation.

Q. What jobs were they?

A. Well, on the country crew, he mentioned he wouldn't do,—he said I won't go into the country because if I would I would have to scoop and I said if you did I am sure you won't have to scoop as there are lots of jobs in the country crew that won't have to do with scooping; that very thing come up.

Q. You didn't offer any definite job?

A. Well I wasn't in a position to know just exactly where the opening was there.

Q. You never instructed any of your crew foremen to put Milo at some job other than scooping?

A. No, I didn't. In fact, I never talked to any of our [899] crew foremen about Milo, the only one I talked to was Fred Foreman. If Milo would come back to work as I invited him to do I would certainly have gone to the crew foreman and helped work out a job that would have been agreeable to Milo and the crew foreman too.

Q. Did you tell Milo that?

A. I think I did or he knew that and could infer that from our conversation. I didn't want Milo to leave. I think Milo in his heart knows that. [900]

Q. And you stated that you were not against the union as such but that you questioned the leadership

(Testimony of Farrel L. Hansen.)

of the union and that was what you informed your employees, is that right?

Mr. Weston: I object to that as being improper statement of the evidence. He didn't say he questioned the leadership but he said he questioned the ability of the leadership to understand the problems.

Mr. Penfield: All right. [901]

Trial Examiner Barton: All right.

A. Yes, I did that, I had that talk with them themselves.

Q. Why did you question the ability of the leadership? A. I didn't understand that?

Q. Why did you question the ability of the leadership?

A. Because I had talked to Ray Hansen at the time of the meeting in the City Hall and at that time I had asked him, for my information and for the information of the boys, that all attended that meeting, of the,—what experience he had had and what background he had, what it was in the potato business, if he was acquainted with the fluctuating nature of our business and the probability of a situation coming around wherein the boys would get less pay or money at the end of the week instead of more if they had unworkable conditions existing. I also met with Ray Hansen and Lee Owens in their room in the Rogers Hotel and discussed that with them at quite some length and as a result of that I came to the unquestionable conclusion that neither one of those gentlemen did understand the potato business and that if our boys

(Testimony of Farrel L. Hansen.)

were not careful that under their guidance and under their direction they would have conditions existing under union contracts that would cause in all probability them to be getting less money at the end of the week than they are making then, if as much.

Q. As a matter of fact you had questioned the ability of the [902] leadership to understand before you had ever talked the matter over with any of the union leaders, isn't that correct?

A. That is not correct.

Q. Your first meeting with Mr. Hansen and Mr. Owen was not until March 2nd, is that correct?

A. I talked to Ray Hansen in the City Hill, that is one of the first meetings we had.

Q. And you really never sat down and tried to negotiate the problems involved?

A. I asked a lot of questions about it, you can ask any of the boys that attended that meeting. I wanted to know what he knew about the potato business and what he proposed to do in keeping the boys in work and if he thought they could raise the pay to an arbitrary amount.

Q. But obviously at that time there had been no contracts submitted, you had no way of knowing what they were seeking did you?

A. That's absolutely true, but I was seeking to find out what they were seeking to do and at these meetings, to make a record to me and a record to them.

Q. And you felt that yourself and the other

(Testimony of Farrel L. Hansen.)

potato dealers were in a better position to advise the men? A. No, not at all.

Mr. Weston: Just a minute. [903]

A. (Interposing and continuing) That wasn't the idea at all. Our employees and our directors and myself, they are the ones that work out employee relations and our wage scales and conditions to a large extent and our policy is to pay what the traffic will bear, creating the most workable conditions it is possible to have, and after talking to Ray Hansen it was quite obvious to me the boys were treading on dangerous grounds so far as accomplishing or making any constructive progress through him was concerned.

Q. And you felt you would advise them of that and the farmers?

A. Well I felt it was my obligation to my employees to go that far.

Q. Now,—

A. I never advised them not to join the union.

Q. Now you spoke of discussing this matter with the growers and I believe you testified that you thought that the growers weren't,—or those around here had an interest in the matter and were somewhat disorganized, is that correct?

A. Yes.

Q. And did you conclude that it would be desirable to endeavor to organize the growers?

A. Yes, or have them,—

Q. (Interposing) And it was to that end that these various meetings and these various,—strike

(Testimony of Farrel L. Hansen.)

that. And it was to that [904] end that you attended and spoke at these various meetings of the Grange and other organizations?

A. I would say to a majority extent, yes.

Q. Now, I believe that you also testified that you thought this was a matter you felt that extended somewhat beyond the Potato Growers Association, that it involved as a whole all the dealers, is that correct?

A. Well it involved all the growers and the dealers too.

Q. And the dealers? A. Yes.

Q. And so at these various meetings, these Monday meetings that you attended, why, these matters were discussed among the various dealers present?

Mr. Weston: What matters?

Q. These matters pertaining to the labor contract and the effect that it would have on the growers and the dealers, isn't that correct?

A. I don't recall that I discussed with the growers the growers' positions so much. I don't recall that that was mentioned.

Q. As a matter of fact you concluded it would be desirable for you to all work together to a certain extent in seeking to solve this problem, was it not?

A. No, no; that wasn't my idea.

Q. Well you did meet and discuss at these meetings with Mr. [905] Weston and the various growers?

A. Yes, it was discussed in various phases, however, the thought I had there, with reference to the

(Testimony of Farrel L. Hansen.)

growers was that they should be at least advised of what conditions were existing and give them an opportunity to appoint and elect a committee representing the various producing districts so they in turn might be represented on any discussion or negotiation or consideration.

Q. You didn't feel that this was a matter of your labor relations with the union,—that it was one that could be settled by each individual grower did you? A. No.

Q. I mean, each individual dealer?

A. Well, yes; I didn't feel that as far as our Association was concerned that it would be in order to discuss it under any blanket arrangement. There are too many things that are entirely different between our operations perhaps and somebody else's.

Q. Yet you felt that a certain amount of uniformity among the dealers around here would be a desirable thing?

A. Well, I don't know; I may have done and I may not have done it,—it depends on the particular question involved. That could be and it could not be; that would not be a blanket supposition.

Q. Did you ever discuss it,—strike that. The Potato [906] Growers Association did give certain wage increases, did they not, during the last season?

A. Yes, we have given,—yes, we did. Before that time too.

Q. There were a number of them that were given after the union presented their contract, that were put in effect?

(Testimony of Farrel L. Hansen.)

A. I think there was one or two given after the contract was submitted.

Q. Were these wage increases ever discussed with the growers? A. You bet.

Q. They were? A. Yes.

Q. Did you have meetings with the growers?

A. Yes.

Q. That is, just as far as the Association is concerned? A. Yes sir.

Q. Were those meetings with the membership?

A. Yes; with the Board of Directors and the membership both.

Mr. Penfield: I believe that's all. [907]

Q. Now, I have to come back again to Swede Norell. I believe he testified that he offered Milo Rash his job. Would there have been any objections on your part or Mr. Foreman's or anyone else as to what job he was given?

A. There would be absolutely no objection on my part. In fact, I would have been very glad to have concurred in that if it had been submitted to me for my opinion.

Q. And Swede Norell had authority to give him any job he wanted?

A. Absolutely, he did; and if Mr. Fred Foreman abided by my instructions I certainly couldn't and wouldn't have objected to that.

Q. Did you have any idea in mind when you made any of these wage increases that it might have interfered with the union some?

A. That was not taken into consideration. [910]

(Testimony of Farrel L. Hansen.)

Recross Examination [911]

Q. Will you explain for us just exactly what this sack job was that Milo Rash had before his employment was terminated last February?

A. I will try. We have two plans that we use to supply sacks to our growers, both for their harvest requirements and for their requirements in bringing the potatoes from their cellars to the warehouse in the winter time. One plan is the farmer buys the sacks himself and pays for them, under which plan we find it necessary to keep the sacks properly separated and tagged with the grower's name on them when he brings them into the warehouse. The other plan is of a rental. The Association acquired a quantity of bags and where a grower doesn't care to buy them outright, a rental charge is made upon them to him that just about equals the purchase price by the time they are worn out, as near as we can estimate. In each of these plans, our sack service, we have found it necessary to have a man take care of the tagging and marking and piling up of the bags that we use in our harvesting,—or I mean in our marketing work; grading work. Does that give that to you enough so you get the picture of it? I would like to also mention that it is quite often our experience, in fact, constantly our experience, that [914] the time required and the help necessary on this job is very close to the volume of business we do during harvest time or any period, or when our volume of operations is greater it takes a man's time and maybe after supper, longer hours, to take care of those sacks.

(Testimony of Farrel L. Hansen.)

Q. Did you innovate the plan of having one man work or look after that work after you became manager?

A. Yes, that was not in existence when I went over there. In fact, we didn't have it for about 18 months after I went over there and we found it advisable to have such a man.

Q. Well who was first given that job, if you remember?

A. As I recall it was a fellow by the name of Joe Scofield. He was a little older fellow.

Q. Do you remember how long he had that job?

A. I can't remember any detail, no.

Q. Did anybody else follow him before Milo took it?

A. It seems to me we had two or three different ones on that at different times of the year. I don't recall just exactly the time that Milo took it on, but I do know that Milo worked at other work prior to the time he took the sack job on.

Q. What is Scofield doing now?

A. Oh, just kind of a handy man. He helps fill the trucks and,—fills them with gas and checks the tires and checks the oil and kind of keeps the floor swept and cleans and picks up [915] around machinery and picks up tools and puts them away.

Q. How are you handling the sack job at this time?

A. The assistant foreman over there is handling it now.

(Testimony of Farrel L. Hansen.)

Q. How much of his time does it take, would you say?

A. Oh, right now our operations are fairly light and I would say approximately 50 per cent of his time at this date. A little earlier, why, the higher the volume was and it took practically all of his time and I think sometimes he has had to have a little help some periods.

Q. Has he handled it ever since Milo was there?

A. For the most part he has. He,—they may have been someone put on there for a short period of time, but I will not say for sure what that was, because I am not out in there enough to keep closely conversant with what happens every day.

Q. How did the assistant foreman spend his time before he took over that job?

A. Oh, he would have mostly the supervising of the packing of potatoes in boxes.

Q. Has that always been his, or has that been shifted to somebody else?

A. No, it is almost discontinued. We haven't shipped any wooden box packs this year; and it dwindled away last year. [916]

Q. (Mr. Penfield) Is it your testimony Mr. Hansen, that,—who is the assistant foreman? [917]

A. Lester Long.

Q. Now as a matter of fact, Mr. Hansen, he was,—he did not take over Milo's duties when Milo left, did he?

A. Yes, he did; took over the responsibility for them.

(Testimony of Farrel L. Hansen.)

Q. Isn't it a fact that someone else performed that job for a short period?

A. Might have been for a day or so, but not more than that and it would be,—it would have been under Mr. Long's direction himself because he was in charge of that responsibility. [918]

LESTER JAMES LONG,

called as a witness in rebuttal for and on behalf of the Board, being first duly sworn, testified as follows:

Rebuttal—Direct

Trial Examiner Barton: Your full name, please?

A. Lester James Long.

Trial Examiner Barton: Oscar James Long?

A. Lester James Long.

Q. (By Mr. Penfield:) Where do you live, Mr. Long? A. Here in the city.

Q. What was that? A. Here in town.

Q. Where are you employed?

A. Idaho Falls Potato Growers.

Q. In what capacity?

A. I am in charge of the sacks this year.

Q. How long have you worked for the Potato Growers? A. About eight years.

Q. In addition to having charge of the sacks, do you have any title, or perform any other duty?

(Testimony of Lester James Long.)

A. Well, not unless I have sufficient time to do other work.

Q. Do you have any title of any sort?

A. No.

Q. You are not a foreman?

A. Well, I was last year, but I try to look after things as [925] much as possible, but I wouldn't say I was a foreman this year.

Q. Now what were you doing at the commencement of the 1941-1942 season? Just what was your job, or work?

A. Well, I worked on the sorter until,—the first couple of months, then I took over the special box packing a little later on.

Q. Did any employees work under you in that connection? A. Yes.

Q. How long did this continue?

A. Well, I helped,—I had charge of that until I took over the sacks.

Q. Now, will you tell us how you happened to take over the sack job?

A. Well, after Milo left, they were going to try and get along without a man to look after them, and Vic Mussman kind of looked after them, and Joe Schoefield, and they got kind of muddled up, and Fred told me I had better look after them and do what box work I could.

Q. Do I understand you that Vic Mussman and Joe Schofield did this work immediately after Rash left? A. Yes; they started in the next day.

Q. They did? And how long did they continue?

(Testimony of Lester James Long.)

A. Continued about two days.

Q. Did Schofield have another job? [926]

A. Yes; he was taking care of the gas.

Q. What,—do you know how long Mussman had worked for the company?

A. He started in the fall of that same year.

Q. That was his first season?

A. As near as I remember, yes.

Q. What had he been doing before he worked on the sack job?

A. He was packing potatoes in boxes.

Q. Under your direction? A. Yes.

Q. Were you informed there was any dissatisfaction with Mussman's work on the sacks?

A. Well, he didn't spend enough time, he told me, and I don't suppose he knew a great deal about how to go about it, and therefore he got muddled up.

Q. Who told you that?

A. Who told me what?

Q. Did anyone tell you he wasn't handling the sacks properly?

A. Well, Fred. They were getting in a condition where he told me I had better take it over and straighten it out, or they was going to have some trouble.

Q. You mean Fred Forman?

A. That is right.

Q. And that was several days after Rash had left, was it, that he told you this? [927]

A. Well, I think it was the third day.

(Testimony of Lester James Long.)

Q. And did you take over the job at that time?

A. Yes, sir.

Q. Did you continue to work at that job for the balance of the season?

A. Well, yes. When it got slack I also did other work, working on the sorter towards the end of the year when it began to slacken off and there wasn't much to do.

Q. Approximately how much of your time did the sack job take for the balance of the season?

A. Well, I imagine about two-thirds of the time. It would depend on the volume of business they did at the different times.

Q. During the time that Rash had the sack job, did he perform other jobs during the slack period?

A. Well, he helped me with my box job, and when we would sometimes get pretty well caught up I would help him, in turn.

Q. After you took over the sack job, did,—who did the work you had been doing up to then?

A. Ronnie Goodman and Vic Mussman.

Q. This work you,—this work they were doing was work Rash could have done?

A. Yes. He helped me off and on.

Q. Do you know if Mussman was a member of the Union? [928]

A. No; he wasn't.

Mr. Penfield: I believe that is all.

Rebuttal—Cross

Q. (By Mr. Weston) Mr. Long, I believe you have testified that when Milo first left there they

(Testimony of Lester James Long.)

expected to get along without filling that job, is that right?

A. Well, that is the way I understood it.

Q. Then they discovered that things got mixed up, and you took over, together with your other duties? Is that right?

Trial Examiner Barton: The answer is "yes?"

A. Yes.

Q. And that is a job that becomes increasingly difficult with the amount of business you have in the place, is that right? A. That is right.

Q. When you have a heavy volume then it takes more time than when you have a light volume?

A. It takes a lot of time when business is good.

Mr. Weston: I believe that is all.

Trial Examiner Barton: Are you looking after the sack job now?

A. Yes, sir.

Trial Examiner Barton: How much of your time is it taking this season? [929]

A. Well, it takes the biggest share of your time.

Trial Examiner Barton: What do you mean by that? Explain what you mean by that.

A. Well, I mean it takes just about the regular time the sorters run, or the crews in the country, so far as that goes.

Trial Examiner Barton: Right after you went on the sack job last February,—is that when it was?

A. I don't recall the time. It was shortly after Milo left.

(Testimony of Lester James Long.)

Trial Examiner Barton: All right. Right after you went on the job, how much time did you have to devote to it?

A. Well, it was according to the amount of business. I would say about two-thirds of the time, or sometimes more, and sometimes less.

MILO RASH,

recalled as a witness for and on behalf of the Board in rebuttal, being previously duly sworn, testified as follows:

Rebuttal—Direct

Q. (By Mr. Penfield) Mr. Rash, were you present in the Courtroom when Mr. Farrel Hansen testified here? A. This afternoon? [930]

Q. Yes. A. Yes, sir.

Trial Examiner Barton: You are the same Milo Rash who has heretofore testified in this case?

A. Yes, sir.

Q. (By Mr. Penfield) Do you recall Mr. Hansen referring to an incident regarding some mix up with regard to some bags? A. Yes, sir.

Q. Can you tell us about that incident?

A. Well, on one of the days that I was told not to report to work that there wouldn't be anything to do, Mr. Wood brought over these sacks, and the next day I went there, and I was helping Mr. Long paste some knocked down pasteboard cartons together,—fifty pound cartons to ship potatoes in, and Mr. Wood came in with the shims, and,—

(Testimony of Milo Rash.)

Q. What are shims?

A. They are to go on top of the potatoes, in the top of the bag to keep the strings from bruising, and he brought the shims to me and he told me they went on the potatoes that he had brought the sacks over for, so I took some of the Scotch tape we were pasting the boxes together with, and put it around them, two different kinds, and I put them around them and marked on each package how many there was in it, and I took them into the little office where Fred Forman was,—him and Nels Strong was in there playing panguingi,—and I [931] gave them to him and told him that Mr. Wood had brought them over and they was to go on the potatoes that was to be shipped in his bags, and he just took them and tossed them over in the corner, and so I left, and the car of potatoes was shipped after I was fired. I never saw the sacks.

Q. You never did?

A. I never did see the sacks.

Q. They came in on a day you were not working?

A. Yes, sir.

Q. Did Fred Forman ever speak to you about this incident, seeking to put the blame on you?

A. No; because they had done it after I left, and he never did say anything to me about it. I was told about it.

Q. Did you hear the testimony of Mr. Norrell?

A. Yes, sir.

Q. Will you state just whether or not Mr. Norrell ever offered you a job on a country crew?

(Testimony of Milo Rash.)

A. He never offered me a job in his life. I was sent out on a crew by Fred Forman once or twice, but so far as him offering me a job, he never did.

Q. When you were sent out, that was during the early period when you worked on the country crew?

A. Yes, about a month and a half I worked on a country crew.

Q. After you were discharged, Mr. Norrell never offered you a job? [932]

A. Never did; no, sir.

Trial Examiner Barton: Did you ever have any conversation with him after your employment was terminated?

A. I don't,—I imagine we talked together the Sunday I went over there to this meeting they had in regard to Ed. O'Neil.

Trial Examiner Barton: Do you recall the conversation?

A. No. I would go in there every once in a while when I am up here and talk to some of them. I had lots of friends over there, and I still have a few, I think.

Q. (By Mr. Penfield): Mr. Rash, did Mr. Hansen or Mr. Forman ever offer you a definite job in either the warehouse or in the country?

A. No, sir.

Q. That is, after your employment was terminated?

A. Yes, sir.

Mr. Penfield: I believe that is all.

(Testimony of Milo Rash.)

Rebuttal—Cross

Q. (By Mr. Weston): You testified the other day that Forman said you could go out on a country crew, didn't you?

A. No, sir. He told me maybe I could go out with a country crew.

Q. That is right. And you said you wouldn't go because you would have to scoop? [933]

A. I said I knew what I would have to do, I would have to scoop.

Q. But he did tell you maybe you could go out on a country crew?

A. He told me maybe I could go out on a country crew after he gave me my check.

Q. Did you ever see Wood's sacks at all?

A. Not that I know of.

Q. If they came in there, it would have been your job to handle them, wasn't it? [934]

A. Well, Fred received a lot of sacks when I wasn't there.

Q. Did you know when you gave the shims to Fred whether or not Wood had any sacks in there or not?

A. Yes; he just got through telling me he had brought them over the day before.

Q. So the Wood sacks were there when the shims came in?

A. I imagine they were. I never saw them, but he said they were there.

Q. What I am getting at is, Why did you give

(Testimony of Milo Rash.)

them to Fred? Why didn't you take care of them yourself?

A. I was in the basement counting out bags, and I was busy and they might stop and change their run to something else, so if I happened not to be there Fred could give them to him.

Q. Isn't it, or wasn't it, your job to keep charge of the sacks? A. Yes, sir.

Q. And aside from what Wood told you, you don't know whether he had any sacks there or not? A. No. [935]

FARREL L. HANSEN,

recalled as a witness for and on behalf of the Board in sur-rebuttal, having been previously sworn, testified as follows:

Surrebuttal—Direct

Q. (By Mr. Weston): You heard Mr. Rash testify here with reference to when this car of Mr. Wood's was shipped, did you not?

A. Yes, sir.

Q. He testified it was shipped after he had left the employ over there? A. Yes.

Q. I will ask you, Mr. Hansen, to tell us what your conversation was with Mr. Forman with reference to this Wood deal? [936]

A. I criticized Mr. Forman because the potatoes were not packed in Mr. Woods' bags, and they were

(Testimony of Farrel L. Hansen.)

not prepared according to instructions, and he blamed Mr. Rash for it.

Q. What did your office,—what did you discover with reference to the date that car was shipped?

A. I discovered the car was shipped on February twenty-fourth, the last day of Mr. Rash's employment with the organization, according to our payrolls. Evidently it occurred the same day he left. [937]

Mr. Penfield: Yes. I would like to read these stipulations in connection with the question of the raises in wages granted to employees from the commencement of the 1941-1942 season to the present time. We have received the following information from the various companies:

(1) With respect to the Idaho Falls Potato Growers, at the time of the commencement of the season the wage rates for regular employees was forty-five cents per hour; for foremen, fifty cents per hour. September 18th, 1941, these rates were raised to fifty and fifty-five cents per hour, respectively; February 5th, 1942, the rates were raised to fifty-five and sixty cents per hour, respectively; April 16th, 1942, the rates were raised to sixty and sixty-five cents per hour, respectively. At the commencement of the 1942-1942 season, the wage rates were seventy and seventy-five cents per hour. October 1st, 1942, they were raised to seventy-five and eighty cents per hour; on October 30th, 1942, to eighty and eighty-five cents per hour.

(2) With respect to L. S. Taube & Company,

the wage rates at the commencement of the 1941-1942 season were forty [941] cents per hour, regular, forty-five cents for crew foremen.

Mr. Penfield: Will you change that, Mr. Reporter, where I said the wage rates at the commencement of the 1941-1942 season, and change those rates to read fifty cents for regular employees, and fifty-five cents for crew foreman. January 22nd, 1942, the rates were raised to fifty-five and sixty cents, respectively; on May 1st, 1942 they were raised to sixty-five and seventy cents, respectively; September 3rd, 1942, the rates were seventy-five and eighty cents, respectively; on the 8th of October, 1942, the rates were eighty and eighty-five cents respectively.

(3) With respect to Respondent Friedman there is no rate distinction for various job classification. Work commenced in January, 1942, and the rate of pay was fifty cents per hour; February 1st, 1942, this was raised to fifty-five; April 10th to the closing of the season it was raised to sixty cents. The Respondent Friedman has not yet commenced operations during the present season.

(4) With respect to Respondent Idaho Falls Warehouse Company, at the opening of the 1941-1942 season the wages paid the regular crew members were fifty cents per hour. This continued until the week of February 14th when the rate [942] was increased to fifty-five cents an hour. This continued until the week of April 18th when it was increased to sixty cents per hour, which amount was paid until the end of the season. Commencing in September, 1942, the crew men were paid seventy-five cents

an hour until October 16th, at which time they were raised to eighty cents an hour.

(5) With respect to Respondent O'Neil, commencing the 1941-1942 season the rates were fifty-five cents to regular crew members; sixty cents to foremen. February 21st, 1942, these were raised to fifty-five and sixty cents respectively. April 11th, 1942, sixty cents and sixty-five cents, respectively; October 12th, 1942, seventy-five and eighty cents, respectively; in November of 1942, to eighty and eighty-five cents, respectively.

(6) With respect to Respondent Stuart the rates at the commencement of the 1941 season were fifty-five cents per hour. In January this was increased to fifty-five cents per hour. On March 21st, this was increased to sixty cents; on April 30th to sixty-five cents, which continued until the end of the season. In September of 1942 the rates were raised to seventy-five cents; September 20th, raised to eighty cents; October 1st, to eighty-five cents.

(7) With respect to Respondent Holden Brothers, the rates at the commencement of the 1941-1942 season were fifty cents per hour. In January, 1942, this was raised to [943] fifty-five cents per hour; on April 19th, 1942, this was raised to 60 cents. In September, 1942, the rates were seventy-five cents; in November, 1942, this was raised to eighty cents.

(8) With respect to the Respondent Wilson, Mr. Weston has not furnished me with any exact figures. However, he informs me, and I understand will stipulate, that the rates paid by the Re-

spondent Wilson are, and the time at which the increases were given, in substance were the same as they were with Stuart. Is that correct, Mr. Weston?

Mr. Weston: That is correct.

Trial Examiner Barton: Do you want the stipulation read back?

Mr. Weston: It isn't necessary.

Trial Examiner Barton: Is it agreeable, Mr. Weston?

Mr. Weston: It is agreeable. [944]

Mr. Penfield: That would be, of course, much better. At this time I would like to make a motion to have the pleadings conform with the proof, with the understanding that this motion only goes to the question of names and other such [945] errors which may have appeared from the proof, and does not go to the substance of the pleadings.

Trial Examiner Barton: You are making that motion with respect not only to the complaint but with respect to the answer and any other pleadings?

Mr. Penfield: Well, I suppose that would be desirable.

Trial Examiner Barton: The reason I asked you was because you said the "pleadings;" you didn't say the "complaint," as I understood you?

Mr. Penfield: I suppose probably I am limited to the complaint.

Trial Examiner Barton: Well, I will pass on your motion as applied to the complaint. If Mr.

Weston wants to make a similar motion as to his pleadings, he may do so.

Mr. Weston: We would like to do that, Mr. Examiner.

Trial Examiner Barton: All right. Then I take it there is no objections to the motion?

Mr. Weston: No.

Trial Examiner Barton: It is granted as to all pleadings. [946]

Mr. Penfield: I would like the record to show the respondent has produced a copy of the by-laws of the Idaho Traffic Association which we requested, and I will ask that this be introduced in evidence as Board's Exhibit No. 59.

(Whereupon the exhibit heretofore referred to was marked as Board's Exhibit No. 59 for identification.)

Mr. Weston: No objection.

Trial Examiner Barton: It may be admitted as such. [1004]

(Whereupon, Board's Exhibit No. 59 for identification, was received in evidence.)

[1005]

BOARD'S EXHIBIT No. 59

By-Laws of Idaho Traffic Association, Inc.

I. — Office

The principal office of the Association shall be in Idaho Falls, Idaho.

II. — Seal

The Association shall have a common seal, con-

sisting of a circular form with name at its circumference and the word "Seal" in the center.

III. — Corporate Power

The corporate powers of this Association shall be vested in a board of seven (7) directors, who shall be members in good standing, holding membership certificates in the Association, and five (5) directors shall constitute a quorum for the transaction of business.

IV. — Objects

The objects of this Association are:

1. To furnish shippers service of every kind and nature to the members of the Association, and to render help and assistance in all matters appertaining to traffic problems of all kinds, and matters arising out of the preparation, inspection, sale and shipment of merchandise and commodities of whatsoever nature.

2. To own, lease, purchase, hold and have, use and take possession of and enjoy, in fee, real or personal property necessary for the uses and purposes of the corporation, and to sell, lease, alien or dispose of the same at the pleasure of the corporation, and for the uses and purposes for which the corporation is formed.

V. — Election of Directors

The directors shall be elected at the annual meeting of the Association to be held on the first Tuesday of November of each year, to serve for one year and until their successors are elected. Their terms of office shall begin immediately after election.

Three of said directors so elected must be chosen from the territory south and west of Pocatello, Idaho to Bliss, Idaho, and four of said directors must be chosen from the territory north of Pocatello, Idaho.

VI. — Vacancies

Vacancies in the board of directors shall be filled by the other directors in office, and such persons shall hold office until the first meeting of the Association thereafter. Any director may be removed from office by a two-thirds vote of members present at any regularly called meeting for that purpose.

VII. — Power of Directors

The directors shall have power:

1. To call special meetings of the Association when they deem it necessary, and they must call a meeting at any time upon the written request of one-third of the enrolled membership.
2. To appoint and remove at pleasure all agents and employees of the Association, and to fix their compensation, and require from them security for faithful service.
3. To conduct, manage and control the affairs and business of the corporation, and to make rules and regulations not inconsistent with the laws of the State of Idaho, or the by-laws of the corporation, for the guidance of officers and management of the affairs of the Association.
4. To prescribe the terms and conditions of membership and to name the fee for such membership.
5. To, by unanimous vote of all members of the

board, expulse any member of the Association.

6. To fill vacancies left by officers due to inability to act, expulsion, resignation or death.

VIII. — Duties of Directors

It shall be the duty of the directors to supervise all officers, agents and employees, and to see that their duties are properly performed; and to cause to be issued to members, certificates of membership.

IX. — Officers

The officers of the said corporation shall be a President, a Vice-President, a Treasurer and a Secretary, who shall be chosen by the Directors from among themselves; provided, that the Secretary and Treasurer need not be directors and may be the same person.

I.—President

The President, or officer acting as such,

1. Shall preside at all meetings of the Association and directors, and shall have the casting vote.

2. He shall sign as President all contracts and other instruments of writing, except membership certificates, which shall have first been approved by the Board of Directors.

3. He shall call the directors together whenever he deems it necessary, and shall have, subject to the advice of the directors, direction of the affairs of the Association, and, generally, shall discharge such other duties as may be required of him by the Board of Directors.

XI. — Vice-President

It shall be the duty of the Vice-President to assume the duties of the President in case of his absence, or inability to act.

XII. — Secretary-Treasurer

1. It shall be the duty of the Secretary-Treasurer to keep record of proceedings of meetings and such minutes as directed by the Board of Directors.

2. He shall receive and account for all funds of the Association in a depository designated by the Board of Directors, and pay them as the Board of Directors may prescribe. He shall handle the funds of the Association in such manner as prescribed by the Board of Directors.

3. He shall submit such accounts as are requested by the Board of Directors, and furnish bond if they require it.

4. He shall keep the corporate seal and affix it to papers requiring the seal of the corporation.

5. He shall keep the membership book, or books, showing the date and number of each certificate of membership and to whom issued, and the place and date of forfeiture, cancellation or other final disposition of such certificate.

6. He shall keep proper account books.

7. He shall serve, or cause to be served, all notices required to be served by law or by the by-laws of the Association; and in case of his absence, inability, refusal or neglect so to do, then such notices may be served by any member directed by the president.

XIII. — Liability of Members

No member of the Idaho Traffic Association, Inc. shall be personally liable for any debts or liabilities of the corporation.

XIV. — Books and Papers

Members may inspect the books and papers at regular or special meetings, in the presence of a majority of the Board of Directors.

XV. — Certificate of Membership

Certificates of membership shall be of such form and device as the Board of Directors may elect, and each certificate shall be signed by the secretary, and express of its face its number, date of issuance, classification, duration of time and person to whom it is issued. The certificate book or stub shall contain a margin on which shall be entered the number, date and the name of the person, partnership, corporation or association expressed in the corresponding certificate.

XVI. — Membership Fees

The membership fee for the ensuing year shall be set each year by the Board of Directors.

XVII. — Meetings

The annual meeting shall be on the first Tuesday of November of each year, and shall be called by the President and Secretary by giving notice by publication or otherwise, stating time and date and place of such meeting.

The Board of Directors shall meet at such time

as the Chairman of the board shall call such meeting of the board, provided that the chairman must call a meeting of the board on written request of the President of the Association and three members of the Board of Directors.

Special meetings of the Association may be called by the President, if he elects, and he must call such a meeting if requested in writing by one-third of the membership.

If all of the Board of Directors sign the minutes of any meeting or agree to any proposition in writing, no matter how the meeting was called, or if no meeting were called, the acts of the board in so doing shall be as valid and of the same binding affect upon the Association as though they were the result of a regularly called meeting.

XVIII. — Manner of Election and Voting

At all meetings of the Association, each member in good standing; (Provided: associate members will not be entitled to vote), shall be entitled to vote upon all propositions coming before said association, Provided, that no voting by proxy shall be permitted, and no member shall be entitled to vote without being actually present at such meeting at the time of voting. No cumulative voting shall be permitted, and each member of the Association shall have but one vote for each director or officer to be elected.

XIX.—Amendments

These by-laws may be repealed or amended at any regular meeting of the membership, provided, ten days notice is given of the intention to amend or

adopt. A majority of all the active members will be required to amend or adopt these By-Laws.

Know All Men By These Presents: That we, the undersigned, being all of the members of the Board of Directors of the Idaho Traffic Association, Inc., hereby assent to the foregoing by-laws, and adopt the same as the by-laws of said association.

In Witness Whereof, we have hereunto subscribed our names this.....day of....., 19.....

.....
.....
.....
.....

Know All Men By These Presents: That we, the undersigned, directors of the Association known as the "Idaho Traffic Association, Inc.", do hereby certify that the above and foregoing by-laws were duly adopted as the by-laws of said association on the.....day of....., 19....., and that the same do now constitute the by-laws of said association.

.....
.....
[Corporate Seal]
.....
.....
.....

Attest:

.....

Secretary.

[Endorsed]: No. 10490. United States Circuit Court of Appeals for the Ninth Circuit. Idaho Potato Growers, Inc., W. P. Wilson, L. S. Taube, Ted Taube and L. B. Holden, Co-partners, doing business as L. S. Taube & Company, Meyer Friedman and Arthur E. Friedman, Co-partners, doing business as S. Friedman & Sons, Idaho Falls Warehouse Company, Rowena O'Neill, Administratrix of the Estate of J. E. O'Neill, deceased, A. G. Stuart, C. R. Holden and L. L. Holden, Co-partners, doing business as Holden Brothers and Idaho Traffic Association, Petitioners, vs. National Labor Relations Board, Respondent. Transcript of Record. Upon Petition for Review and Petition for Enforcement of Order of The National Labor Relations Board.

Filed August 14, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In The United States Circuit Court of Appeals
For the Ninth Circuit

No. 10490

IDAHO POTATO GROWERS, INC., ET AL.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

STATEMENT OF POINTS

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the Petitioners and set forth the statement of points relied upon by them in their petition for review.

POINT No. 1

That the decision and order, findings of fact and conclusions of law of the Board upon which the said decision is based is not in accordance with law and the Board is without jurisdiction over the petitioners' employees, inasmuch as said employees are agricultural laborers within the meaning of such term and definitions thereto applied.

POINT No. 2

Your petitioners allege that the Board, through its Trial Examiner, erred in its finding and conclusion that the authority to control the workmen working in the farmer's cellar rests entirely with the foreman, whereas the facts show that the farmer has control over the workmen, may discharge them

or stop the work going on in his cellar or in the warehouse, on his potatoes.

POINT No. 3

The Petitioners allege that the Board, through its Trial Examiner, erred in its finding and conclusion that the employee, Willard Moore, was discriminated against, whereas it appears that Willard Moore was one of the youngest men in point of service working for the company and, whereas it appears that all the employees laid off by L. S. Taube & Company were laid off because of seasonal lack of work and, whereas it appears from the record that Willard Moore was consulted by the employer and asked to report back for work.

POINT No. 4

The petitioners allege that the Board, through its Trial Examiner, erred in its finding and conclusion that the employee Milo Rash was discriminated against in regard to hire and tenure of employment, or that the employer in any way violated Section Seven of the Act.

POINT No. 5

The petitioners except to the finding of the Board, based on the conclusion of the Trial Examiner, that the petitioners had not bargained in good faith during the fall of 1942, beginning with the meetings of October 7th and 12th.

POINT No. 6

The petitioners except to the findings of the Examiner (Page 27 of the Report) that the Idaho

Traffic Association interfered with or restrained the employees in the exercise of their rights under the National Labor Relations Act, or that the Idaho Traffic Association is an employer, as found by the Examiner.

POINT No. 7

The petitioners except to the findings of the Examiner (Page 27 of the Report) that the respondents, L. S. Taube and Idaho Potato Growers, are indebted to Willard Moore or Milo Rash, or that either of said employees have suffered any loss.

POINT No. 8

The petitioners except to the ruling by the Examiner, denying the respondents' motion to dismiss upon the grounds set forth in said motion, a copy of which is a part of the record herein.

Wherefore, the above petitioners and each of them request that the order in the above entitled case be dismissed and modified as requested by the petitioners, or that such other and further relief be granted, as to the Court may seem just, fair and equitable.

Dated at Boise, Idaho, this 13th day of September, 1943.

PETITIONERS ABOVE
NAMED,

By: E. A. WESTON
E. A. WESTON,
Attorney

[Endorsed]: Filed Sept 27, 1943. Paul P. O'Brien, Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit

IDAHO FALLS POTATO GROWERS ASSO-
CIATION AND IDAHO TRAFFIC ASSO-
CIATION, ET AL,

AND

TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS, LOCAL
983, A.F.L.

BRIEF OF PETITIONERS

*Upon Petition for Review and Petition for Enforcement
of Order of the National Labor Relations Board*

FILED

FEB 16 1944

E. A. WESTON,
255 Sonna Bldg.,
Boise, Idaho,
Attorney for Petitioners.

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit

IDAHO FALLS POTATO GROWERS ASSO-
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E. A. WESTON,
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Boise, Idaho,
Attorney for Petitioners.

INDEX

	<i>Page</i>
1. Statement of pleadings and facts disclosing the basis upon which it is contended that the National Labor Relations Board had jurisdiction and that this Court has jurisdiction to review the order of the Board.....	5
2. Concise abstract and statement of the case presenting succinctly the questions involved and the manner in which they are raised, with Statement of Facts.....	8
3. Specification of Errors Relied Upon.....	13
4. Issues.....	14
5. Argument.....	14
6. Under the facts in this case the Petitioners' employees were engaged as agricultural laborers.....	14
7. Any violation of the National Labor Relations Act in this case was caused by the farmers and growers and not the Petitioners..	30
8. The Petitioners were justified in refusing to bargain with the Union, inasmuch as the Union did not establish itself as representing a majority of the employees.....	31
9. The employees Milo Rash and Willard Moore were only temporarily laid off and were offered reemployment, but made no effort to return to work.....	31
10. Conclusion.....	33

TABLE OF CASES

	<i>Page</i>
Anderson vs. Meacham, 1 W.H. Cases 1012, Bureau of National Affairs.....	28
P. G. Batt vs. Industrial Accident Board, 63 Idaho 572, 123 Pac. (2d) 1004.....	21
Big Wood Canal Co. vs. Industrial Accident Board, 63 Idaho 785, 123 Pac. (2d) 15.....	20
Carstens vs. Industrial Accident Board, 63 Idaho 613, 123 Pac. (2d) 1001.....	19
Davis vs. Industrial Commission, 59 Utah 607, 206, pp. 267, 269...	28
Dye vs. McIntyre Floral Co., 1 W.H. Cases 1150, Bureau of National Affairs.....	28
Great Western Mushroom Co. vs. Industrial Commission, 103 Col. 39, 82 Pac. (2d) 751.....	23
Hampton vs. Marshall, 1 W.H. Cases 729, Bureau of National Affairs	28
Miller Hatcheries vs. Boyer, 131 Fed. (2d) 283.....	27
North Whittier Heights Citrus Association, 109 Fed. (2d) 3681.....	23
Smythe vs. Phoenix, 63 Idaho 585, 123 Pac. (2d) 1010.....	22
Stark Bros. Nursery, 1942, 40 N.L.R.B. 221	26
U.S. vs. Turner Turpentine Co., 111 Fed. (2d) 400, 404, 42 U.S.C.A., p. 1011.....	24
U.S. vs. Hudson, D.C. 65 Fed. 68, 71 (1 Words and Phrases, Perm. Ed., 1).....	25
Walling vs. Rocklin, 44F Supp. 355, 132 Fed. (2d) 3.....	26

TABLE OF STATUTES

49 Stat. 450 Sec. 3.....	26
29 U.S.C.A., 152 Sub-section 3, National Labor Relations Act.....	9

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United States
Circuit Court of Appeals
For the Ninth Circuit

IDAHO FALLS POTATO GROWERS ASSO-
CIATION AND IDAHO TRAFFIC ASSO-
CIATION, ET AL,

AND

TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS, LOCAL
983, A.F.L.

BRIEF OF PETITIONERS

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
CASE No. XIX-C-1116 ET AL.

STATEMENT OF PLEADINGS AND FACTS DIS-
CLOSING THE BASIS UPON WHICH IT IS
CONTENDED THAT THE NATIONAL LABOR
RELATIONS BOARD HAD JURISDICTION
AND THAT THIS COURT HAS JURISDICTION
TO REVIEW THE ORDER OF THE BOARD.

The Petitioners, Respondents below, with the excep-
tion of the Idaho Traffic Association, are potato packers
in the eastern section of the State of Idaho, and they

have contended from the beginning that the employees working for them are agricultural laborers and not subject to the National Labor Relations Act because of Section 2(3) of said Act, which is as follows:

“When used in this Act * * *

“(3) The term ‘employee’ shall include any employee and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.”

The petitioners also contend that any interference with the union, or violation of the National Labor Relations Act was caused by the farmers and growers, and not by these petitioners.

Petitioners also contend that the two employees that were laid off, were laid off on a temporary basis only, and that by custom and practice they knew, or should have known that it was their duty to apply for reinstatement; that they were offered re-employment but made no effort to return to work.

There is no substantial controversy to the facts, except as to certain details with reference to how

many of the petitioners raise their own potatoes and as to the amount of control exercised by the farmers over the packing of the potatoes and over the employees so engaged. The questions finally boil down as follows: (1) Are the employees working in these potato sheds engaged as agricultural laborers? (2) Are the petitioners excused from liability because of the activities of the farmers and growers in this area? (3) Were the employees discharged because of union affiliations or were they merely temporarily laid off due to lack of work?

The petitioners maintain that all of these questions should be answered in the affirmative. The respondent contends that they should be answered in the negative.

These questions were presented by a motion to dismiss (p. 82) by the answer (p. 60). The motion to dismiss was denied.

The material facts are few and simple and will be stated in logical order rather than in the order in which they appear in record.

Before giving a statement of facts, we summarize here our points:

POINT No. I

We believe the evidence shows in this case the employees engaged in these operations to be agricultural laborers.

POINT No. II

We believe that any violation of the National Labor Relations Act that may have occurred herein was caused by the activities and actions of the growers and farmers, and not these petitioners; that this entire problem is one involving agricultural labor on or in the vicinity of the farm.

POINT No. III

We believe the petitioners were justified in refusing to bargain with the union unless or until the union could prove representation of a majority of the employees.

POINT No. IV

We believe the employees, Milo Rash (Idaho Potato Growers, Inc.) and Willard Moore (L. S. Taube and Co.), were lawfully and temporarily laid off due to lack of work and their own inefficiency. These employees made no effort to return to discuss further employment or to improve their status as employees.

CONCISE ABSTRACT AND STATEMENT OF
THE CASE PRESENTING SUCCINCTLY THE
QUESTIONS INVOLVED AND THE MANNER
IN WHICH THEY ARE RAISED.

The petitioners have maintained from the beginning that while the petitioners are engaged in interstate commerce, nevertheless the National Labor Relations Board has no jurisdiction over either the petitioners or their employees, inasmuch as they are engaged in agriculture and the employees are agricultural laborers.

This action was started upon the filing of charges by the Teamsters, Chauffeurs, Warehousemen and Helpers, Local No. 983, A.F.L., alleging that the petitioners had committed certain unfair labor practices by interfering with the union, discharging of employees and refusing to bargain. To these charges the petitioners filed an answer denying the same and pleading that the employees involved were engaged in agricultural labor.

The petitioners also filed a motion to dismiss on the grounds that the National Labor Relations Board was without jurisdiction, inasmuch as the employees in-

volved were agricultural laborers. This motion was denied (p. 82).

The case was then heard before a trial examiner of the National Labor Relations Board, who made an intermediate report. The petitioners then argued the case before the National Labor Relations Board and that Board thereafter on the 10th day of April, 1943, ordered the Petitioners to, among other things: (1) Bargain with the union. (2) Make whole two employees, Milo Rash and Willard Moore, working for the Idaho Potato Growers, Inc., and L. S. Taube and Company, respectively. (3) Post the usual notices that petitioners would comply with the board's order.

This being a case under the National Labor Relations Act [29 U.S.C.A., Sec. 160, sub-section (f)], this Court has jurisdiction to review the order of the Board.

STATEMENT OF FACTS

Of the eight petitioners involved in this case, seven are what are commonly called "potato packers," operating potato warehouses where potatoes in their raw and natural state are sorted and packed in bags for shipment. All but two of the eight petitioners raise potatoes on their own farms, and by common practice a large percentage of the sorting and packing is performed in the farmers' cellars with all the packing under the control of the farmer. Most of the potatoes are purchased on the basis of U.S. No. 1 grade, and until the grade is made, the ownership of the potatoes remains in the grower.

One of the two remaining petitioners, the Idaho Falls Potato Growers, Inc., is a non-profit cooperative mar-

keting association organized under the usual cooperative marketing act, and set up for the purpose of marketing its members' potatoes. This petitioner has a large membership of growers and producers, and markets substantially more than any other individual packer. The remaining petitioners, the Idaho Traffic Association, is a trade organization, organized for the purpose of disseminating information pertaining to rates, freight charges, government regulations, etc., and has been in existence for several years last past.

Beginning with the latter part of December, 1941, the Teamsters, Chauffeurs, Warehousemen and Helpers Local 983, American Federation of Labor, hereinafter referred to as the "union," started a campaign to organize the workers working both in the warehouses and in the farmers' cellars, in the Idaho Falls area, and on February 13, 1942, by letter requested bargaining rights of the petitioners with the exception of the Traffic Association.

From the very beginning the farmers and growers gave notice to the petitioners that they (the growers) would not sell or consign their potatoes to these petitioners, if they had dealings with the union, and during this period, and up to April 15, 1943, numerous meetings of various kinds were held among all parties concerned, with very little, if any, progress made toward negotiations.

The Union did not, through certification, cross-check, or election, establish their right to bargain for the employees of the above-mentioned respondents. They were requested to do so by the respondents' representative (p. 315). This proof was finally submitted

at the time of the hearing about nine months after the request to bargain was made.

The shipment of potatoes from the area in which these petitioners are located (Idaho Falls, Idaho) ceases on or about May 1, each year, and a large percentage of the employees working in the warehouses return to the farms for the growing season. There was little or no contact or activity between May 1 and September 15, 1942, either on the part of the union or the employers. When the fall season started (September 15, 1942), a meeting was arranged between a committee from among the petitioners and representatives of the union. This meeting is described by both the petitioners and the union as a sincere constructive collective bargaining agreement (p. 450).

The petitioners have at all times contended that their employees are engaged as agricultural labor and therefore without the jurisdiction of the National Labor Relations Act.

There are two common methods of handling potatoes in the Idaho Falls area. Under one method, the packer purchases the potatoes outright, usually field run, and assumes the entire responsibility for packing the same, the grower paying for the packing indirectly in the price he receives for the potatoes. This method is unusual and represents perhaps 15-20 per cent depending upon the packers, the season, and the potatoes.

The second method and one most commonly adopted is to purchase the potatoes from the grower, U.S. Grade No. 1 made. Under this method, the grower retains control of the packing of the potatoes and ownership in them until the grade is made and approved by the

Inspector from the Department of Agriculture. Under this method the farmer sometimes recruits his own crew and sometimes specifies the crew he wants. The farmers at times pay for the labor of packing. A great deal of the packing is done in the farmers' cellars, perhaps 90 per cent of the first run, or roughing operation. In the case of the petitioners, the Idaho Potato Growers, Inc., the ownership in the potatoes remains with the grower at all times, even after shipment, and up to the time of sale. Under this method of handling, very often employees working on the farms assist the crews in sorting and sacking potatoes and very often the same employees that planted, cultivated, and dug the potatoes assist in sorting the same. Under this system, the farmer has control over the method or manner in which the potatoes are sorted and sacked, even though they are sorted and sacked in the packer's warehouse.

The sorting and sacking of potatoes is a simple operation, with all employees of the crew receiving the same rate of pay except the head sorter, who usually receives five cents per hour additional. Most farmers in the past and at the present time own their own sorting tables and equipment and the sorting that was formerly done exclusively by the farmer on his farm is the same as is now being done by the packers and the farmers in the warehouses. Practically the only difference in the various jobs on the sorting table is the strenuousness or the weight of the job. Otherwise, the jobs are all unskilled and may be performed by anyone, and they are particularly adapted to farm labor.

SPECIFICATION OF ERRORS RELIED UPON

I

Petitioners specify that the Board erred in affirming the rulings made by the Trial Examiner wherein the Trial Examiner found as a fact that the employees of the petitioners, with the exception of the Idaho Traffic Association, were not employed as agricultural laborers. The Board erred in refusing to grant the petitioners' motion to dismiss on the grounds that the employees were employed as agricultural laborers.

II

Petitioners specify that the Board erred in affirming the rulings made by the Trial Examiner wherein the Trial Examiner found as a fact that the employees Willard Moore (L. S. Taube and Co.) and Milo Rash (Idaho Potato Growers Association, Inc.), were discharged for union affiliation and that the union was discriminated against thereby.

III

Petitioners specify that the Board erred in affirming the ruling made by the Trial Examiner wherein the Trial Examiner found as a fact that the petitioners were guilty of interfering with the union, whereas the interference, if any, actually came from the farmers and growers.

IV

Petitioners specify that the Board erred in entering an order against these petitioners on the 10th day of April, 1943.

I S S U E S

The issues are briefly and clearly stated in the above Specification of Errors and involve the three questions: (1) Are the employees involved herein engaged as agricultural laborers? (2) May the petitioners be guilty of unfair labor practices if the same were committed by the growers and farmers or under their control? (3) Are the petitioners, L. S. Taube and Co., and the Idaho Falls Potato Growers, Inc., obliged to make the employees Willard Moore and Milo Rash whole, where the employees made no effort to return to work and where the employment was merely a seasonal or temporary layoff? Were the petitioners justified in refusing to bargain with the union until the union established its right to represent a majority of the employees?

A R G U M E N T

POINT No. 1

We believe the evidence shows in this case the employees engaged in these operations to be agricultural workers.

A careful study of the results of the cases decided under the National Labor Relations Act shows that the principles enunciated therein are becoming well-established guide-posts in the field of labor relations. We do not propose to dispute those principles or suggest their reconsideration, but wish to briefly bring to the Court the problem confronting the petitioners who are engaged in the agrarian pursuit of handling and sacking potatoes for market.

Under the Statement of Facts showing how the potatoes are packed in this area we find the following pertinent incidents: (a) The packers own and operate their own farms upon which they grow potatoes that are packed, along with potatoes purchased from other growers (pp. 264, 185, 186, 263, 275, 276), (b) Most of the potatoes are subjected to a preliminary "roughing" operation in the growers' cellars and on the farms (p. 269), (c) A large number of the employees engaged in sorting and packing the potatoes are farm boys living in the community, returning to the farms when the packing season is over (p. 231), (d) The potatoes are not changed in form and the operation of sacking and sorting is the usual simple operation performed by the farmer in preparing his product for market (p. 218), (e) Control over the method of packing the potatoes remains with the grower (pp. 226, 227), (f) Ownership in the potatoes remains with the grower until the grade is made, and in the case of the Idaho Potato Growers, Inc., until the potatoes are sold (pp. 258, 259), (g) In some instances the cost of labor in packing is borne by the grower and sometimes the crew sorting and sacking the potatoes may move from farm to farm without working in the petitioners' potato shed (p. 257), (h) All of the packing is done within a very small agricultural area of production adjacent to the farms.

"Agricultural labor" as defined by the U.S. Department of Agriculture is as follows:

"* * * AGRICULTURAL LABOR. The term 'agricultural labor' includes all services performed

“(1) On a farm, in the employ of any person, in connection with cultivating the soil, or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, poultry, and fur-bearing animals and wildlife.

“(2) In the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation, improvement, or maintenance of such farm and its tools and equipment, or in salvaging timber or clearing land of brush and other debris left by a hurricane if the major part of such service is performed on a farm.

“(3) In connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes.

“(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity: but only if such service is performed as an incident to ordinary farming operations, or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing,

or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption. As used in this subsection, the term 'farm' includes stock, dairy, poultry, fruit, fur-bearing animals, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards."

The above definition, as interpreted by the Social Security Board, would consider the employees involved in this case as "agricultural labor," and they have so ruled. Numerous state unemployment insurance laws would likewise consider these employees "agricultural labor" and the Victory Tax follows the rule adopted by the Social Security Board.

In narrowing down the question of what is "agricultural labor" we come to these significant questions:

(1) Does the farmer-grower own the product that is being prepared for market?

(2) Is the preparation for market the usual method used by a farmer-grower?

(3) Has the form or content of the product remained the same in preparation for market?

(4) Is the work incidental to and a regular part of farming, harvesting and preparing the product for market?

(5) Does the grower-farmer have control over the product and the manner in which it is pre-

pared for the market, and is the preparing for market done in such close proximity to the farm that it can be controlled and supervised by the farmer-grower?

(6) Does the grower-farmer pay the labor?

Referring to the above six questions, an affirmative answer is supported by the evidence in this case. The only two questions that might cause some debate are numbers four and six. Number four asks, "Is the work incidental to, and a part of a normal farming operation?" No one can dispute the fact that the work of sacking potatoes is a simple manual farming operation which would either be performed by the farmer or his hired man, and we believe the job of sacking potatoes is an incident to the growing, cultivating and harvesting of the same, inasmuch as the product must be sacked before it is marketed.

If we compare this operation with the harvesting of wheat, or the making of hay, the analogy is clear. Certainly sacking wheat or shoveling it into wagons is an incident to its preparation for market. The stacking of hay is an incident to its preparation for market. These are the usual, customary, and necessary actions of the grower.

The answer to question number six, "Does the farmer pay for the labor costs?" may cause some question. We believe the evidence in this case supports an affirmative answer (pp. 231, 232, 257). The witnesses all testified that the grower-farmer paid the bill for labor in all cases, either in the price that he received for his product, and in the case of the Idaho Falls Potato

Growers, Inc., the testimony shows that the farmer sometimes paid the bill for labor personally, or he was charged the exact amount of the labor by the Association.

The Supreme Court of the State of Idaho has passed on this question in three different types of cases within the last two years, and in each instance has followed the logical trend of authorities and has clearly determined that the confusion now existing can be cleared away by applying the true test to the laborer, "Is the work performed by the laborer 'farm labor'?"

In the case of Carstens Packing Company, a corporation, versus Industrial Accident Board (63 Idaho 613, 123 Pac. (2d) 1001), the Court stated:

"In deciding whether one employed to assist in fattening feeder livestock is, in so doing, performing agricultural labor, within the meaning of the Unemployment Compensation Law, the nature of the service rendered is controlling—not the means by which the employer acquired title to the livestock."

and again in the same decision, we find this statement:

"One employed to feed livestock, to prepare it for market, is engaged in agricultural labor, within the meaning of the Unemployment Compensation Law, and, in order that his labor be so classified, it is not necessary that it be performed on tillable farm land. In *Smythe vs. Phoenix*, above cited, we said: 'The fact appellant himself did not breed and raise the lambs would not detract from the

feeding and fattening as being agricultural. Respondent herein was engaged in an agricultural pursuit upon the nine acres constituting the appellant's feed lot as much as if the nine acres had been a part of any one of appellant's farms. All of the work performed for him by respondent was incidental to and a necessary part of fattening sheep for market, appellant's sole purpose as disclosed by the record, and thus exactly similar to any other livestock employer. Until they were properly fattened the lambs were not a completed range or farm product at least for slaughtering purposes."

In the above case the Carstens Packing Company, a corporation, employed laborers to feed and fatten sheep for slaughtering and the work performed was on acreage used for that purpose only.

In the case of the Big Wood Canal Company versus the Unemployment Compensation Division of the Industrial Accident Board, 63 Idaho 785, 123 Pac. (2d) 15, the Court again held that employees working for the corporation and assisting in the operation of canals, ditches, flumes and laterals for the delivery of water to the farmers, were agricultural labor, the Court stating:

"* * * it is safe to assume that the members generally (referring to the 1939 Legislature), if not unanimously, knew and understood that substantially the whole of southern Idaho is arid in its native state; and that the growing of agricultural crops in all this vast region is impossible without

the artificial application of water. It is just as essential to have canals, ditches, flumes, and laterals for the delivery of water to the land, as it is to have the land in order to grow the crops.

“* * * The fact, that the Big Wood Canal Company employs and pays men who tend and maintain the reservoirs and canals, and measure and deliver the water to the farmers, renders them no less laborers in the interest and field of agriculture, since the entire maintenance and operating expense is charged up to and prorated among the various farms and tracts of land to which the water is delivered as an appurtenance.”

And once again in the case of *P. G. Batt versus Unemployment Compensation Division of the Industrial Accident Board*, 63 Idaho 572, 123 Pac. (2d) 1004, the Court held that employees engaged in packing lettuce or sacking potatoes are agricultural laborers even though the products packed are either purchased or consigned or grown by the packer himself, the Court in the Batt case stated as follows:

“It appears from the stipulation of facts, and is admitted that this so-called *processing* merely consists of sorting, washing and grading these several farm products and packing or crating them for shipment and market. It is further stipulated and found as a fact, that the same laborers do the work on both the purchased and the consigned products; and that the work is identical on both.

“It is clear that the appellant does, for hire, just such work as the farmer would have to do himself

or hire someone else to do, on the farm or elsewhere, in preparation of his products for market. For this labor, the appellant received and deducted from the sale price 'the expenses including a charge for processing and a brokerage charge,' and paid the balance to the farmer. It further appears that all culls and unsalable portions of the products consigned were returned to the owner, after the so-called processing was completed.

"I fail to see wherein the work done upon consigned products is any less 'agricultural labor' than that done upon the same kind of products purchased by appellant or grown by him on his own farm. It was all *agricultural labor*."

This same opinion was rendered in a fourth case, Walter Richard Smythe versus W. G. Phoenix, 63 Idaho 585, 123 Pac. (2d) 1010. In this, the Court states as follows:

"Cases which have held in line with the thought that the work engaged in by appellant here was of an agricultural nature bringing it within the exemption clause of the unemployment statute are: Holmes vs. Travelers Ins. Co. (Tex.), 148 S.W. (2d) 270, in which a dairy farm employee feeding cows was held to be engaged in an agricultural pursuit. Other cases holding employees on dairy farms were engaged in agriculture are Hardy vs. Gapen (Pa.), 14 Atl. (2d) 892; Application of Butler, 16 N.Y.S. (2d) 965; Keeney vs. Beasman, 169 Md. 582, 182 Atl. 566. Hauling garbage to feed pigs was held farm labor in Halletz vs. Wise-

man, 183 N.Y.S. 112. Feeding and caring for poultry was held to be farm labor in *Bennett vs. Stoneleigh Farms*, 4 N.Y.S. (2d) 255. An employee on a demonstration farm operated by a creamery on which turkeys, hogs, and cattle were raised was held to be a farm laborer in *Hebranson vs. Fairmont Creamery*, 187 Minn. 260, 245 N.W. 138."

When the six questions above propounded are answered in the affirmative, we all agree that the work performed in preparing potatoes for market is "agricultural labor." However, in a number of cases, particularly the *North Whittier Heights Citrus Association* case, 10 N.L.R.B. 1269, 109 F. (2d) 3681, and the *Great Western Mushroom Company vs. Industrial Commission*, 103 Colorado 39, 82 Pac. (2d) 851, the Courts based their decisions on the theory that the determining factor is who employs the laborer rather than what is the work performed by him.

We believe that the cases adopting the theory of the *North Whittier Heights* case can be distinguished from the instant case because of the type of work that was being done and because in those cases the work was all performed off the growers' premises, title to the product changed and control over the method of packing was released, and because it required a higher degree of skill than sorting and sacking potatoes, by the use of machines and equipment, and skilled migratory labor.

The true test or proper definition of "agricultural labor" should contemplate the actual work performed (services customarily performed by a farm hand) and

not necessarily where the work is performed, or by whom paid.

The employees rendering the services in the present case are performing services mandatory and necessary in the marketing of products and they are the same, identical services performed by the growers and farmers whenever the farmer sells his own crop.

The services are exactly the same regardless of where they are performed. In *United States vs. Turner Turpentine Co.*, 5 Cir. 111 F. (2d) 400, 404, the Court, in discussing the term "agricultural labor" under the Social Security Act (42 U.S.C.A. 1011) remarked:

"* * * When then, Congress, in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor,' it must be considered that it used the term in a sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the Act operates. This does not mean, of course, that a mere local custom which is in the fact of the meaning of a general term used in an act, may be read into the act to vary its terms. It does mean, however, that when a word or term intended to have general application in an activity as broad as agriculture, has a wide meaning, it must be interpreted broadly enough to embrace in it all the kinds and forms of agriculture practiced where it operates, that its generality reasonably extends to."

From the foregoing authorities, it may be stated that the word "agriculture" is very broad in scope, that "farming" is a species of the general term "agriculture," and that the preparation of potatoes on a farm, or adjacent thereto, for market, is agricultural labor.

Supposing potato packing work is done partially in a packing house, as in the instant case, would this transfer in work-place correspondingly change the label "agricultural labor" to something else?

Clearly, the statement in the act refers to the kind or character of the work performed and not to the place of its performance.

The important question is: What is the character or nature of the work?

We interpret the language in the statute as words describing "services customarily performed." Hence, instead of the Act referring to the place of performance, it merely described the type of service—the nature of the work—coming within the term "agricultural labor." The prepositional phrase, "on a farm" adds merely to the general description of the nature of the services. The legislature did not intend that the statute should define agricultural labor in a limited or confined sense, especially when it employed the comprehensive term "agricultural" and used the indefinite article "a" rather than the definite article "the."

"'The' is the word used before nouns, with a specifying or particularizing effect, opposed to the indefinite or generalizing force of 'a' or 'an.' (United States vs. Hudson (D.C. 65 F. 68, 71. 1 Words and Phrases, Perm. Ed., 1.)"

Section 3(f) of the Fair Labor Standards Act of 1938 also exempts "agricultural labor," and we believe the real intent of Congress in passing both the National Labor Relations Act and the Fair Labor Standards Act was to exempt employees engaged as "agricultural" laborers, and it is made quite plain in the latter act that the actual test is, "What does the employee do—does he handle products from the farm in their raw and natural state, or is he engaged in a first-processing operation, and is he within the area of production." These are the tests that are significant and determinative. The employee's status is not determined by his place or manner of employment, but more logically, by what he does.

The cases decided under the Wage and Hour Law indicate the trend away from the theory of the North Whittier Heights case and toward a more sensible position of using the test of what the employee does.

The Court has held that employees in a nursery, where the work consists of receiving, handling, packing, trucking and selling of nursery stock, are "agricultural." *Walling vs. Rocklin, et al.*, U.S.C.A. 132 F. (2d) 3, 44 F. Supp. 355.

We believe the case of National Labor Relations Board vs. Stark Brothers (1942, 40 N.L.R.B. 221) strengthens the position that the real question should be, "what does the employee do?" the Board in this case stating:

"* * * We are of the opinion that while the conduct of a nursery such as the respondent's is both a commercial and an agricultural operation,

the employees here involved are agricultural laborers within the meaning of the Act. In this regard it is to be pointed out that nursery employees have consistently been held to be agricultural laborers under the Fair Labor Standards Act, as administered by the Wage and Hour Division of the Department of Labor."

Further on, in the same opinion, we find the following statement:

"* * * We are of the opinion, moreover, that the controlling fact in construing the term 'agricultural laborer' is the essential character of the work performed, which, as we have stated, is here primarily connected with the growing of crops and nursery stock. We are accordingly constrained to find that the exclusion of 'agricultural laborers' in Section 2(3) of the Act applies to an indeterminate number of the respondents' employees involved in this case, and that the Board, therefore, is without jurisdiction to include such workers in a unit for the purposes of collective bargaining."

In a Second Circuit Court of Appeals decision at Kansas City, the Court held that the agricultural exemption applied to employees in a commercial chicken hatchery, located in a city, and selling its baby chicks. *Miller Hatcheries, Inc., vs. Boyer*, 131 F. (2d) 283.

In some unreported cases under the Fair Labor Standards Act, this trend seems quite clearly established. In the case of *Dye vs. McIntyre Floral Co.* (1

W.H. Cases 1150), the Court held that employees in a nursery were engaged in agricultural labor within the meaning of the Fair Labor Standards Act. *Hampton vs. Marshall*, U.S. Dist. Court, Northern District of Texas (1 W.H. Cases 729). An employee guarding a warehouse storing cotton was considered "agricultural." In the case of *Anderson vs. Meacham* (1 W.H. Cases 1012) the Court held an employee assisting in the grinding and sacking of meal in a grist mill engaged in agricultural labor.

The test in these cases is not the place of performance, but the character and nature of the performance. This is clearly illustrated by *Davis vs. Industrial Commission of Utah* (59 Utah 607, 206 Pac. 267, 269). Claimant was engaged by a farmer to herd sheep in the public domain. His claim for injuries was denied on the ground that the Utah Industrial Act excepted "agricultural labor."

"* * * In upholding denial of compensation, the Court stated: "The applicant for compensation herded sheep for his employer on the public domain. If he was an agricultural laborer when herding on the owner's ranch, the fact that the sheep were herded elsewhere would not remove him from this class of labor. If raising stock on a small farm is agriculture, raising stock on a large ranch is the same; and if raising and caring for sheep on the owner's premises is agriculture, the laborer's avocation is not changed by the sheep being pastured and herded elsewhere, whether on the public domain or not."

“The crux of the question is whether or not the fact that these services are rendered off the farm by organizations performing the service for the farmer on a customs basis changes the services from agricultural labor to something else.”

In the final analysis, the question that must be decided by this Court is whether the true test shall be the nature of the work performed by the employee, the control over his activities and the area within which he works and not by whom he is hired or the number of employees involved. The present case can be distinguished from the North Whittier Heights case: *first*, on the ground that the employees in this case do a great deal of the work in the farmers' cellars and on the farmers' premises; *second*, the work is not as skilled or technical and does not require the machinery, as does the packing of fruit, and *third*, some of the potatoes packed by these employees are grown by their employer, and *fourth*, the ownership of the potatoes and control over their packing remains with the grower.

We do not believe the Court can distinguish and divide the employees in this case. Some are working for a non-profit, cooperative association; some for the owners of large farms and tracts of land; and some for just packers packing both their own potatoes and those of others. To try to distinguish and divide would only add to the confusion and not clarify the problem. We can not say they are all agricultural while on the farm and something else when off the farm. If, on the other hand, the Court will apply the tests as urged by the

petitioners and affirmed in the cases above cited, the legislative intent will be supported by the decision and the nature of the services performed will become the true test and the employees involved herein declared agricultural labor.

POINT No. II

We believe that any violation of the National Labor Relations Act that may have occurred herein was caused by the activities and actions of the growers and farmers, and not these petitioners; that this entire problem is one involving agricultural labor on or in the vicinity of the farm.

Under Point No. 2, we raise two defenses: *first*, we do not believe as employers we are obliged to bargain with the union unless it established its right and gives us proof of the same. *Second*, the independent actions by the farmers and growers, serving notice they would not supply potatoes if petitioners dealt with the union, prevented us from bargaining during the period covered by this ultimatum (p. 445).

Considering the first defense, we refer to petitioners letter dated March 16, 1942 (pp. 315-316) wherein petitioner suggested that the union establish their right to bargain for the petitioners' employees.

The second defense is apparent to anyone who knows the temper and attitude of a group of irate Idaho farmers who are asked to produce and work day and night for the war effort and see any possibility of interference. These farmers meant what they said to the petitioners.

POINT No. III

We believe the petitioners were justified in refusing to bargain with the union unless or until the union could prove representation of a majority of the employees.

Bargaining in good faith by the petitioners at the beginning of the new season in September, 1942, absolved petitioners of any acts or charges alleged by the union for the spring season ending April 15, 1942 (p. 450).

By custom and practice the petitioners employ new and different crews from season to season with no obligation to re-hire the same group; however, a great many of the same employees do return to the same employers from season to season.

When the spring season closed in 1942, very little headway had been made toward negotiations but with the new season starting in September, 1942, it is admitted by all concerned that bargaining in good faith and in a sincere manner was in progress (pp. 385, 450). The petitioners contend that this meeting of minds and negotiations between the parties absolved the petitioners of any charges or acts that may have been committed prior to the meetings and that this was understood and contemplated by the Union during these meetings.

POINT No. IV

We believe the employees, Milo Rash (Idaho Potato Growers, Inc.) and Willard Moore (L. S. Taube and Co.), were lawfully and temporarily laid off due to lack of work and

their own inefficiency. These employees made no effort to return to discuss further employment or to improve their status as employees.

The offer by the employer to reinstate employees Milo Rash and Willard Moore and the refusal of these employees to come back to work, relinquishes any liability on the part of these petitioners (pp. 696, 697, 700, 704, 708).

In the case of the Idaho Falls Potato Growers, Inc., the employee Milo Rash was offered reemployment by a head sorter, or crew foreman, and Rash refused the offer by claiming he would be overworked. There is no evidence in the record that Rash would be overworked or placed in any different position from the others; in fact, the testimony of all witnesses seems to be all of the jobs on the sorting machine were practically the same and that the employees changed positions from time to time merely to relieve the monotony of the work.

We believe that Milo Rash should have accepted reemployment and that he had no legal right to anticipate mistreatment, and we believe further the petitioners' liability, if any, ceased when Rash refused to go back to work.

In the case of the employee, Willard Moore, Willard discussed the situation with his employer shortly after his layoff and the employer suggested that he come over and discuss the subject, and although Moore agreed to do so, he never came back, and thereby prevented the employer from reinstating him when the work was available (p. 672).

In the case of the petitioners, L. S. Taube and Co., employers of Willard Moore, the evidence shows that employees are laid off from time to time, depending upon the available work; that by custom and practice the employees come back and ask for their jobs or keep in close contact with the employer for available work.

In the case of Willard Moore, the employer suggested that he return and discuss the matter. The evidence shows that Moore never applied for his old job, nor would he come over at the request of the employer (p. 672). We do not believe there is any evidence to support the charge that this employer discriminated against the employee Willard Moore.

Dated at Boise, Idaho, this.....day of
of February, 1944.

Respectfully submitted,

ELI WESTON

Attorney for Petitioners,

Office and Postoffice

Address Box 1922, Boise, Idaho.

United States
Circuit Court of Appeals
For the Ninth Circuit

IDAHO ~~FALLS~~ POTATO GROWERS
ASSOCIATION AND IDAHO TRAF-
FIC ASSOCIATION, Et Al,

and

TEAMSTERS, CHAUFFEURS, WARE-
HOUSEMEN AND HELPERS, LO-
CAL 983, A.F.L.

No. 10490

PETITIONERS' REPLY BRIEF

*Upon Petition for Review and Petition for Enforce-
ment of Order of the National Labor Relations Board*

E. A. WESTON,

255 Sonna Bldg.,

Boise, Idaho,

Attorney for Petitioners.

FILED

APR 19 1944

PAUL P. O'BRIEN,

CLERK

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TABLE OF CASES

	Page
P. G. Batt vs. Industrial Accident Board, 63 Idaho 572, 123 Pac. (2d) 1004	18
Big Wood Canal Co. vs. Industrial Accident Board, 63 Idaho 785, 123 Pac. (2d) 15	18
Carstens vs. Industrial Accident Board, 63 Idaho 613, 123 Pac. (2d) 1001	18
North Whittier Heights Citrus Association, 109 Fed. (2d) 3681	18
California Employment Commission vs. Butte County Rice Grow- ers Association (Cal. App.), 138 P. (2d) 347	19

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PETITIONERS' REPLY BRIEF

Your Petitioners had hoped to avoid the necessity of filing a reply brief. We did not believe counsel for the Respondent would take issue upon our Statement of Facts. A correct statement of the facts with reference to the nature of the Petitioners' operations in growing and sacking potatoes is of such extreme importance in the determination of the status of these employees as agricultural laborers we are compelled to bring these facts out in clear relief.

In misconstruing the facts, counsel for the Respondent has relied entirely upon the stipulation in the record (p. 273), referring to just two or three of the petitioners, and has failed to consider the testimony of the Petitioners C. R. Holden, A. G. Stanger, L. B. Holden, Farrel Hansen, and Rowena O'Neill, all of whom verify Petitioners' statements with reference to both the raising their own potatoes and ownership and control of workers and potatoes.

Perhaps the simplest way to clarify these facts is to quote directly from the record, and for this purpose we refer first to the testimony of C. R. Holden, (pp. 190 and 191) on the question of how the potatoes are packed by the Petitioners in the farmers' cellars and on their farms:

"Q. About your particular operation; yes.

A. It is our practice on the country crews, we line up nine men, — it takes nine men to the crew, and one man on the crew is the foreman, and they are known as country crews. They are very seldom in the warehouse, unless they should happen to leave from the warehouse, and we furnish them conveyance to get to the job, — and they do practically their entire work on the farm, in the farmers' cellar. We buy these potatoes from the farmer. If he packs them, we allow him a certain amount for that. If we pack them, we buy them for so much and deduct the amount we pay for packing. In other words, if it costs you a dime to pack them, and the

farmer packs them himself, we allow him a dime, — or we did at that time. If we buy them and pack them with these country crews, we figure we paid him a dime less on the price.”

“ In other words, they take them out of the farmer’s cellar without the culls and any decay that might be in them. They run these potatoes over a sorter and run them into bags, and then either the farmer hauls them with his own truck from his farm to the car, or to the warehouse, or we haul them with our trucks direct to the car or warehouse. Does that answer the question?”

The next statement of fact made by the Petitioners but questioned as a statement of fact by counsel for the Board is the following:

(a) “THE PURCHASERS OWN AND OPERATE THEIR OWN FARMS UPON WHICH THEY GROW POTATOES THAT ARE PACKED ALONG WITH THE POTATOES PURCHASED FROM OTHER GROWERS.” (PP. 264, 185, 186, 263, 275 and 276.)

Perhaps the best way to substantiate this fact is to again quote from the record. The testimony of A. G. Stanger of the Warehouse Company, on pages 263, 264, 266 and 267 is as follows:

“Q. Now, do the members of your family who own the corporation also grow potatoes?

A. That is right; we do.

Q. And does the corporation handle and ship the potatoes grown by the members of the family?

A. That is correct.

Q. All of the potatoes grown by them?

A. Not all of them, because some of them are taken to the flour mill by the trucks from the farms, and so forth, and (145) in that particular case they wouldn't but in the most part the potatoes are handled for the family.

Q. Now, does the corporation have some special arrangement in handling the potatoes of the family that is distinguished from the handling of potatoes of other growers?

A. That is correct. The potatoes from the family are handled in very much the same fashion as described by Mr. Hansen for the Potato Growers Association; in other words, they are turned over to us to handle"

"Q. Can you give us the approximate percentages for last year of the entire potatoes that you handled and shipped, that were shipped, first, by the members of your family?

"A. I couldn't give that to you exact there; it would be approximate, because it varies each year, but I would say that possibly last year, fifteen per cent."

The statement of C. R. Holden of Holden Brothers, on pages 185 and 186 of the Transcript testified as follows:

A. I mean our general operation is farming. Most of our revenue and our operations is strictly farming, growing potatoes and stock.

Q. Does the partnership still operate their warehouse?

A. Part of the time, mostly for our own use in production (33) that is handled and grown on our own farm.

Q. Do you still purchase potatoes and carry on sorting?

A. We do, some; yes, sir.

Q. Do you, — and you have employees who are engaged in that work of sorting and handling the potatoes?

A. We have some employees, a small portion of the amount the old corporation you spoke of had. Most of the employees we now have work, a large portion of them, around on the farm, and sometimes work in the warehouse in the winter time when they can't work on the farm. That is correct.

Q. What percentage of the potatoes you now handle are from your own farm?

A. Well, I would say this season, off-hand, about sixty-five or seventy per cent."

In addition to these two witnesses, the Board admits that Stuart and Wilson grow some of their own potatoes, and Mrs. O'Neill raised a large portion of her potatoes in the 1942-1943 season.

Added to this, it is undisputed that the Petitioner Potato Growers, a Co-op, raised all of its potatoes under the agency theory of a pure farmers' cooperative marketing association; in other words, all of the potatoes were owned by the producers and packers.

The next statement which the Board claims is not supported by the record is as follows:

(b) "MOST OF THE POTATOES ARE SUBJECTED TO A PRELIMINARY ROUGH-ING OPERATION IN THE GROWER'S CELLAR AND ON THE FARMS."

On this point we again quote from the record (P. 183), the testimony of C. R. Holden, as follows:

"Q. You had facilities for the sorting and packing of potatoes at that warehouse?

A. We packed a large portion on the farms, but some were repacked in the warehouse here, correct. I would say that ninety per cent of our potatoes was packed in the growers' cellars on the farms, and some of those came into the warehouse and was repacked, and others moved direct in the cars. (29)."

And again from the testimony of A. G. Stanger (P. 269), as follows:

“A. Our employees didn’t handle them; no.

Q. Of those that were packed by you, am I correct in this: Like the other shippers some of the potatoes will be rough-sorted in the cellar and sent in for further sorting in the warehouse, while others will have the grade made in the cellar, and will be shipped directly?

A. That is correct.”

And again from the testimony of L. B. Holden, on Page 215 of the transcript, as follows:

“A. Unless they are coming by their place and it is after they are on the way home they could be dropped off; they could you know.

Trial Examiner Barton: How are these men put on a job; are they told at the warehouse to go out at this place, to a certain job?

The Witness: Well, there might be they would have a job in some cellar, if a grower wants them to come over. Lots of times in a neighborhood if they are packing one grower’s cellar there will be three or four and they will band together and take one right after another and do their own and there will be times one grower will tell them, when he has the crew, that he has sold and he wants them to come over there but they will tell them every night generally so they will know where they are going the next morning.”

Also the same witness on Page 217 of the Transcript, as follows:

“A. Well yes. They have to make the grade, U. S. Grade No. 1 or U. S. Grade No. 2 in the country the same as they do in the warehouse. Our potatoes are all sorted and bought on grades. They are times when they are dirty or roughed up, (84) roughed over, and but they are brought in, and then as soon as prices are a little higher then the growers are all inclined to sell them in the cellar and it is all about the same.”

The statement made by Petitioners as follows:

(c) “A LARGE NUMBER OF THE EMPLOYEES ENGAGED IN SORTING AND PACKING POTATOES ARE FARM BOYS LIVING IN THE COMMUNITY, RETURNING TO THE FARMS WHEN THE PACKING SEASON IS OVER”

does not seem to be seriously disputed by the Board, but we offer the Court the further testimony from the record, the testimony of C. R. Holden, (P. 186), as follows:

“A. We have some employees, a small portion of the amount the old corporation you spoke of had. Most of the employees we now have work, a large portion of them, around on the farm, and sometimes work in the warehouse in the winter time when they can't work on the farm. That is correct.”

And further the testimony of A. G. Stanger, (P. 266), as follows:

“A. Oh, I would say, roughly, — and it is merely a guess because I would have to go to the record, — I would say possibly not over twenty-five per cent are handled by the boys that (147) work on the farm the year round.”

And further the testimony of L. B. Holden, on Page 231 of the Transcript, as follows:

“A. Well, I would say a large percentage of them do help on the farm and some in the harvest.

Q. So that a large percentage of them do work?

A. I couldn't say what the percentage was, but we will have a lot of them as soon as the beets are in and harvested and they will come in; we had a lot this year, or last year.

Q. They help plant and help harvest?

A. They will help harvest and put them in the cellars and come back and help us.

Q. And when you are packing they will go back — when you are through, — they will go back to the farm?

A. Yes.”

(d) THE POTATOES ARE NOT CHANGED IN FORM AND THE OPERATION OF

SACKING AND SORTING IS THE USUAL SIMPLE OPERATION PERFORMED BY THE FARMER IN PREPARING HIS PRODUCT FOR MARKET (P. 218 and 241)

the testimony of Farrel Hansen (P. 241), as follows:

“A. The farmer himself, or the farmer’s hired man, or trading help, one farmer with another. Very, very few farmers in the cellar that don’t at least furnish one man or himself, on the crew.

Q. You mean by that they are present in the cellar to (113) watch the work being done, or do they actually participate in the work?

A. Actually participate in the work.”

(e) CONTROL OVER THE METHOD OF PACKING THE POTATOES REMAINS WITH THE GROWER (PP. 226, 227)

the testimony of L. B. Holden, as follows:

“Q. Lloyd, can you tell us how much control of any the farmer has over, — when these crews are not working at the farmer’s, whether directly or indirectly?

A. I would say one hundred per cent as to staying on, as if the potatoes are not sorted to his satisfaction or his way (94) of thinking; I don’t know what the general practice is, but he will put him out or he will call up and have

someone else called out; that farmer may do that. May be the grower who was thinking or thought it was not a fair grade and something was going in that should come out and he would call up the office and say to send out certain ones or take this crew out entirely.

Q. He really runs the show then?

A. Oh, yes. These potatoes are bought, that is, as U. S. Grade No. 1 and if we miss the grade we call the grower up and he will come in and he hasn't paid until they are all number one grade."

(f) OWNERSHIP IN THE POTATOES REMAINS WITH THE GROWER UNTIL THE GRADE IS MADE, AND IN THE CASE OF THE IDAHO POTATO GROWERS, INC., UNTIL THE POTATOES ARE SOLD (PP. 258, 259)

the testimony of Farrel Hansen (P. 240) as follows:

"A. It depends on what the farmer himself wants to do. In other words, they are his potatoes, and I am working for him, just like anybody else, and if he wants to sort those potatoes himself, well, he gets the order and loads them on the car. If he wants me to rustle his crew for him and send them out to his farm, I do that. If he wants to pay for them with his own check, he can do that, or if he wants me to deduct it out of the potatoes and pay them, I do that."

(g) IN SOME INSTANCES THE COST OF LABOR IN PACKING IS BORNE BY THE GROWER AND SOMETIMES THE CREW SORTING AND SACKING THE POTATOES MAY MOVE FROM FARM TO FARM WITHOUT WORKING IN THE PETITIONERS' POTATO SHED (P. 257)

the testimony of L. B. Holden (P. 233), as follows:

“Q. In other words, the farmer in the final analysis pays the crew for the packing?

A. Yes.

Q. Is that an exact charge for the particular amount in his particular packing, in each instance?

A. Well, a good pack will sell for more than a poor pack.

Q. And the labor makes the difference?

A. Yes, the labor, and the sacks and the crops.”

the testimony of L. B. Holden (P. 214), as follows:

“Q. Well, who would pay the wages?

A. Well there are times when we would pay the wages and there are some times when he would pay the wages, when the growers pays them. If he sells them to some other dealer then he does but if he sells them to us at some other date later then he does or we just deduct them.

Q. But as this work is done, I mean, there are workers actually performing this work and that work has to be paid for at the time of the work and who pays for that?

A. If the grower doesn't we do. (80)."

(h) ALL OF THE PACKING IS DONE WITHIN A VERY SMALL AGRICULTURAL AREA OF PRODUCTION ADJACENT TO THE FARMS.

the testimony of L. B. Holden (P. 231), as follows:

"A. Well, I would say a large percentage of them do help on the farm and some in the harvest.

Q. So that a large percentage of them do work?

A. I couldn't say what the percentage was, but we will have a lot of them as soon as the beets are in and harvested and they will come in; we had a lot this year, or last year.

Q. They help plant and help harvest?

A. They will help harvest and put them in the cellars and come back and help us.

Q. And when you are packing they will go back, — when you are through, — they will go back to the farm?

A. Yes."

A review of the above statements made by the witnesses themselves, should conclusively establish in the Grower: (1) complete control, ownership and domination over both the employees and the products sorted, and (2) that the act of sorting and sacking potatoes is the usual simple farm operation performed by either a farmer or his hired man; That these facts constitute by all means of measurement "agricultural labor."

The Board has carefully avoided any reference in its Brief to the three cases decided by the Supreme Court of the State of Idaho, wherein the Court in three separate decisions held that (1) packing and crating of head lettuce in a warehouse; (2) working on a feeding lot next to a packing house; and (3) working as an employee on a corporation-owned water canal is "agricultural labor." *P. G. Batt vs. Ind. Com.*, 63 Idaho 572, 123 Pac. (2d) 1004; *Carstens v. Ind. Com.*, 63 Idaho 613, 123 Pac. (2d) 1001; *Big Wood Canal Co. vs. Ind. Com.*, 63 Idaho 785, 123 Pac. (2d) 15.

We wish to urge again the distinction between the instant case and the North Whittier Heights case, 109 Fed. (2d) 3681, the employees in this case are doing the common menial farm task of packing and sacking potatoes, using little or no skill; all the employees are rotated from time to time from one job to another; the farmer frequently having his own sorter and having formerly done this work on the farm by himself. All of these facts point to the conclusion

that this is not a skilled occupation and does not require any training or experience.

In conclusion we wish to refer to a recent California case, *California Employment Commission v Butte County Rice Growers Association* (Cal. App.), 138 P. 2d 347, wherein the Court held that a cooperative association maintaining a warehouse where rice was stored and cleaned and prepared for market, and where seeds were stored and furnished to the members, that the employees working in these warehouses were "agricultural employees."

"It is clear from a reading of the opinion that the court regarded the Association, which did business for members only, as simply engaged in activities which represented an extension of the agricultural activities of the members carried on by them on their individual farms, and that the Association was simply a medium for furthering such activities. In this connection the court said in part:

'Clearly the defendant Association was organized and the warehouse was maintained as an agency and means of producing, preparing and marketing the crops of the respective members. It furnishes a method of jointly procuring farm supplies and employees in the manner provided by law. In no sense may the business of the Association be deemed to be a commercial enterprise as distinguished from a farming industry'."

It is clear from this decision that the Idaho Potato Growers, Incorporated, the cooperative involved in the instant case, is performing the same service as is performed in the Butte County Rice Growers Association case, or clearly "agricultural labor", and if the work performed by these employees is identical with the work performed by the employees of the other petitioners, certainly all employees involved herein are "agricultural laborers" as defined by the law.

Dated April 1, 1944.

Respectfully submitted,

E. A. WESTON,
Attorney for Petitioners.

No. 10514

United States
Circuit Court of Appeals
For the Ninth Circuit.

KENNETH ALEXANDER,

Appellant,

vs.

LT. GENERAL JOHN L. DE WITT, Commanding
General of the United States Army of the West-
ern Defense Command and Fourth Army, and
R. B. HOOD, Special Agent in Charge of the
Federal Bureau of Investigation of the United
States Department of Justice located at Los
Angeles,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

SEP - 1 1943

PAUL P. O'BRIEN,
CLERK

No. 10514

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

Page

Appeal:

Certificate of Clerk to Transcript of Record	
on	43
Cost Bond on	38
Designation of Record on (DC)	42
Notice of	37
Statement of Points to be Relied on Ap- peal and Designation of Record (CCA)	45

Certificate of Clerk to Transcript of Record..	43
--	----

Complaint for Preliminary Injunction and for Damages	2
---	---

Exhibits:

A—Letter, September 26, 1939, Ken- neth Alexander from C. W. Nim- itz, Chief of Bureau	19
B—Letter, October 6, 1940, addressed to The War Department, signed Kenneth Alexander	20
C—Letter, December 22, 1941, to Ken- neth Alexander signed by L. B. Hickam, Major, Air Corps, Assis- tant Chief, Military Personnel Di- vision	21

Exhibits—(Continued):

D—Letter, December 8, 1941, Kenneth Alexander to Headquarters, Air Force, United States Army.....	22
E—Copy of Letter, Feb. 27, 1943 to Kenneth Alexander, signed Randall Larson, Lt. Col. F. A.	23
F—Individual Exclusion Order No. 1K-7, signed J. L. De Witt	26
Cost Bond on Appeal	38
Designation of Record on Appeal (CCA)	46
(DC)	42
Judgment	35
Minute Order, May 25, 1943—Hearing on Motion for Injunction Pendente Lite	32
Motion for Injunction Pendente Lite	29
Motion to Deny Plaintiff's Application for Injunction Pendente Lite and to Strike from the Complaint and to Dismiss	30
Names and Addresses of Attorneys	1
Notice of Appeal	37
Order for Transmission of Original Exhibits, Stipulation and	41
Statement of Points to be Relied On by Appellant and Designation of Record (CCA)	45
Stipulation and Order for Transmission of Original Exhibits	41

INDEX

iii

Supplemental Transcript of Record	47
Certificate of Clerk.....	50
Order for Supplemental Transcript of Rec- ord	49
Transcript of Hearing on Motion of In- junction Pendente Lite, etc.	51

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In the District Court of the United States in and for
the Southern District of California, Central
Division

No. 2909-P.H.

KENNETH ALEXANDER,

Plaintiff,

vs.

LT. GEN. JOHN L. DE WITT, RANDELL LAR-
SON, Lt. Col., F.A., R. B. HOOD, Special
Agent in Charge of Federal Bureau of Inves-
tigation, United States Department of Justice,
at Los Angeles, California, HUGH T. FUL-
LERTON, Major, A.G.D., Assistant Adjutant
General, L. G. WHITE, Investigator for Head-
quarters Western Defense Command and
Fourth Army, L. F. SLOAN, Area Supervisor,
War Relocation Authority, DOE ONE, DOE
TWO and DOE THREE,

Defendants.

COMPLAINT FOR PRELIMINARY INJUNC- TION AND FOR DAMAGES

Plaintiff alleges that:

I.

Jurisdiction of this Court is founded upon a
Federal question arising under the Constitution of
the United States; including more particularly:

1—The right of the plaintiff to freedom of re-
ligion, freedom of speech, freedom of the press,

freedom of assemblage, and the right to petition the Government for a redress of grievances as guaranteed by the First Amendment of the United States Constitution; [2]

2—The right of the plaintiff under the Fifth Amendment to a fair and full hearing, to be informed of the nature or cause of any accusation against him, to a presentment or an indictment of a grand jury, to a public trial, to a trial by jury, and to counsel;

3—The rights of the plaintiff under the Fifth Amendment, to liberty and property, and more particularly the right to earn a livelihood and engage in his occupation, the right to establish and maintain a home, the right to free movement; and the right to equality of treatment under the law and to be free from discrimination and persecution solely because of his religious and economic views.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

II.

Plaintiff is a naturalized citizen of the United States of America; plaintiff was born in London, England, about the year 1892, and came to the United States as an immigrant in the year 1904, disembarking at New York City. Plaintiff became a naturalized citizen on June 15, 1915, at Honolulu, T. H., and has since said date been an American citizen.

Plaintiff, desiring to serve the country of his adoption, enlisted in the United States Army at

Schofield Barracks, T. H., on August 27, 1917, and was subsequently honorably discharged on October 16, 1917, on account of physical disability.

Plaintiff, further desiring to serve his country which was then engaged in World War I, at that time voluntarily joined the United States Navy on April 9, 1918, at Washington, D. C., and served a four year enlistment and was honorably discharged on April 18, 1922, as Chief Photographer, P.A., in New York City.

Plaintiff, further desiring to offer his services to aid his country, in September of 1939 made application to the Navy [3] Department, Bureau of Navigation, offering to volunteer his services to the United States. The Navy Department, Bureau of Navigation, Washington, D. C., replied to plaintiff's offer of enlistment as will be shown by a letter from C. W. Nimitz, Chief of Bureau. Copy of said letter is attached hereto, marked Exhibit A, and made a part hereof.

Plaintiff, further desiring to offer his services to his country, on October 6, 1940, addressed a communication to the War Department, Washington, D. C., offering to volunteer in the United States Army. Copy of said communication is attached to this complaint, marked Exhibit B, and made a part hereof. An answer to plaintiff's offer of enlistment in the United States Army was made by the War Department in Washington, D. C., on December 21, 1941, by L. B. Hickam, Major, Air Corps, Assistant Chief, Military Personnel Division.

A copy of said communication is attached hereto, marked Exhibit C, and made a part hereof.

On December 8, 1941, the day following attack on Pearl Harbor by Japan, plaintiff addressed a communication to Headquarters Air Force, Washington, D. C., making inquiries regarding his application to enlist in the Air Force of the United States Army. A copy of said communication, dated December 8, 1941, is attached hereto, made a part hereof and marked Exhibit D.

Plaintiff, desiring to aid his country in World War II in which it is now engaged, voluntarily enlisted in the United States Navy at Los Angeles, California, on May 31, 1942, and served in said Navy as a Chief Photographer, P.A., until he was honorably discharged on September 25, 1942. Plaintiff further states that upon his discharge from the United States Navy on September 25, 1942, at Pensacola, Florida, he returned to his home and place of residence in Los Angeles, California, and promptly reported to the Naval Intelligence Department of the United States Navy at Los Angeles and to the Federal Bureau of Investigation in said city [4] offering to make known to said organizations any information which he had in his possession that would be of assistance to the United States Government. That thereafter the plaintiff, having been denied an opportunity to serve in the Armed Forces of the United States, tried to secure employment in the defense industry at his profession as an expert photographer and photo technician, but for reasons unknown to plaintiff he was denied an

opportunity to work at his trade and profession. Then plaintiff secured employment at his profession as a photographer and was employed by Pacific Studios, commercial photographers, where he has been regularly employed until served with notices and orders from Lt. Gen. John L. De Witt, United States Army Commander, as hereinafter set forth.

Plaintiff further represents that his only means of livelihood is to work at his profession, that of a photographer and photo technician.

III.

Plaintiff has continuously maintained a legal residence in the United States and its territories since he became a citizen of the United States in the year of 1915, and has exercised his right of franchise in different elections held in the United States during said time.

IV.

That Lt. Gen. John L. De Witt is the Commanding General of the United States Army of the Western Defense Command and Fourth Army, comprising an extended area along the Pacific Coast of the United States, and the headquarters and residence of said Lt. Gen. John L. De Witt are at Presidio, San Francisco, California.

That defendants Hugh T. Fullerton, Major, A.G.D., Assistant Adjutant General, and Randell Larson, Lt. Coloney, F.A., Doe One, Doe Two and Doe Three are all officers in the United States Army under the command of said Lt. Gen. John L. De

Witt, Doe One, Doe Two and Doe Three having been appointed as a board of officers [5] to order the exclusion of persons from said Western Defense Command, but their actual names are unknown to plaintiff, plaintiff not being advised of their names at the time of their meeting with him and at the time they conducted an inquiry regarding plaintiff.

V.

Defendant R. B. Hood is a Special Agent in Charge of the Federal Bureau of Investigation of the United States Department of Justice located at Los Angeles, California.

Defendant L. G. White is an Investigator for the Headquarters of the Western Defense Command, Fourth Army of the United States stationed at Los Angeles, California.

Defendant L. F. Sloan is the Supervising Officer in charge of the War Relocation Authority at Los Angeles, California.

Upon information and belief plaintiff alleges that each of said defendants is under the orders and control of the defendant Lt. Gen. John L. De Witt.

VI.

On February 27, 1943, defendant Randell Larson, Lt. Col., F.A., acting under the orders and control of Lt. Gen. John L. De Witt, caused to be executed an order signed by him in his capacity as an officer of the Headquarters of the Western Defense Command and Fourth Army in charge of the Individual Exclusion Hearing Board, addressed to the plaintiff,

advising plaintiff that on Tuesday, March 11, 1943, at 1:30 p. m. at Room 216, Rowan Building, 458 South Spring Street, Los Angeles, California, an inquiry would be made at said time and place, and requesting the plaintiff to advise at least 24 hours prior to the time of hearing if he intended to appear. Copy of said communication is attached hereto, made a part hereof, and marked Exhibit E. Said communication advised plaintiff that he might be accompanied by counsel to act as his personal advisor, but he was advised that any counsel who might represent him would not be heard by the Board and that [6] said counsel would not be permitted to examine witnesses. The communication also advised that the inquiry by the Board was in no sense a criminal proceeding and that plaintiff was not charged by the communication with any penal offense. That on March 11, 1943, at the place and at the time directed in said summons or communication, plaintiff appeared before the so-called Individual Exclusion Hearing Board and was advised that said hearing was to be held in a room at the Biltmore Hotel; that thereafter and forthwith the plaintiff went to a room in the Biltmore Hotel in the City of Los Angeles, California, as directed, where he was confronted by defendants Doe One, Doe Two and Doe Three. Said parties required plaintiff to take oath as to all recitals made by him. The said Board, representing themselves to be a board of inquiry, made inquiries in detail into plaintiff's occupation and relative to his activities in political organizations

and as to his politics and as to his religion, and inquired of plaintiff if he possessed any psychic power by which he communicated with different parties in the United States. Plaintiff was denied an opportunity to examine any information in possession of the Board which might have been detrimental to his interest, nor was he advised that the Board had any information of that character. Plaintiff was advised that much of the information about which they made inquiry was based upon rumor which had been communicated to the Board by parties unknown to plaintiff and whose identity the Board refused to make known to plaintiff. Plaintiff was not given an opportunity to be confronted by witnesses against him, if there were any, and if there were any such witnesses their testimony was taken without affording plaintiff an opportunity to be present at the taking of such testimony or to cross-examine such witnesses or to otherwise and in any manner or form to refute any such testimony. Plaintiff was without counsel and was not permitted in any way to participate in said proceeding except to answer questions and interrogatories that were [7] propounded to him.

VII.

That on April 21, 1943, plaintiff was served with a copy of an Individual Exclusion Order No. 1K-7, dated April 14, 1943. A copy of said Individual Exclusion Order is attached hereto, made a part hereof and marked Exhibit F. Said Individual Exclusion Order No. 1K-7 purports to ex-

clude plaintiff within ten (10) days from date of service of said order from the States of California, Arizona, Oregon and Washington on the West Coast of the United States, and also excludes plaintiff from date of service of the order from the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, the District of Columbia, and a part of the State of Florida, as defined and designated by Proclamation No. 1, dated May 16, 1942, Headquarters Eastern Defense Command, First Army, Government Island, New York, H. A. Drumm, Lt. Gen., United States Army, Commanding; and from entering into, being in or remaining in, from and after said date, Military Area No. 1 of Florida, Military Area No. 1 of Alabama, Military Area No. 1 of Mississippi, Military Area No. 1 of Louisiana, Military Area No. 1 of Texas and Military Area No. 1 of New Mexico, as defined and designated by Public Proclamation No. 1, dated May 30, 1942, Headquarters Southern Defense Command, San Antonio, Texas, Walter Krueger, Lt. Gen., United States Army, Commanding.

VIII.

Plaintiff applied in writing to the defendant, Lt. Gen. John L. De Witt, on April 28, 1943, requesting and petitioning said defendant to cancel said Order of Exclusion or to extend the time to a period longer than 10 days, and requested that

the United States Government furnish to the plaintiff compensation equal to that which he could earn at his trade or profession until such [8] time as he could secure employment in his profession, and further petitioned and requested of said defendant that the United States Government furnish him with support and sustenance until such time as he could secure employment in the event of the Order of Exclusion was carried out and plaintiff was sent to some section of the United States where he was without friends or acquaintances, and plaintiff was advised by the defendant, L. G. White, Investigator for Headquarters Western Defense Command and Fourth Army, on April 30, 1943, that his petition was wholly denied.

IX.

Plaintiff at all times since residing in the United States and its territories has conducted himself as a respectable and law-abiding citizen; that he has never been charged with a violation of the penal laws of the United States or any of the states or territories within the United States; that by reason of plaintiff's conduct, he has established a reputation for honor, truth and veracity and is a peaceable, law-abiding American citizen; that the Order of Exclusion referred to as Exhibit F in effect convicts plaintiff of being disloyal to the United States and publishes to the world that he is disloyal and a dangerous citizen to the extent that he is not permitted to reside in the United States except at those places designated by the defendants; that

the information upon which the Order of Exclusion was issued was and is wholly false; that no ground or basis exists for such an order, and that this fact can and will be established by competent legal evidence if the plaintiff is given an opportunity to present witnesses and to have a hearing or a trial before this Honorable Court.

X.

Plaintiff is not a member of the military forces of the United States and he is not subject to military law or the control or orders of the officers of the United States Army or Navy;

No martial law has been declared in the area from which [9] the plaintiff has been excluded or in the area within which plaintiff has been confined, and no martial law has been declared elsewhere in the continental United States.

At all times herein all of the Courts in the State of California, state and federal, have been open and have administered the same full quality of justice heretofore meted out by them, and have been available to any party desiring to charge the plaintiff with crime or wrongdoing.

XI.

Said orders were issued without according the plaintiff a full or fair hearing, without the plaintiff having been informed of the nature or the cause of any charge or accusation against him; nor has any charge, accusation, or presentment by a grand jury, or at all, been lodged or filed against him;

nor has the plaintiff had any trial by jury or a public trial; nor was the plaintiff advised of the nature or import of any testimony or evidence in the possession of said Board against him upon which testimony or evidence said Board was relying, nor was the plaintiff given an opportunity to refute such testimony or to cross-examine witnesses against him as aforesaid; nor was the plaintiff accorded the right to be represented by counsel and to have such counsel adequately protect his rights through cross-examination, or the inspection of any testimony or evidence against the plaintiff; and said orders were issued without any and/or without substantial evidence to support them or either of them, but on the contrary, said orders are wholly arbitrary and capricious and without any warrant of law, and in defiance of the constitutional rights of the plaintiff, as is more particularly described elsewhere herein.

XII.

Said orders, in addition, are not warranted by military [10] or any other necessity either in the City or County of Los Angeles, anywhere in California, or within the Western Defense Command, or anywhere within the United States; neither of said orders was issued in the face of any existing emergency; or in good faith, nor were or are they, or either of them, directly related to any emergency; nor was there any danger in said City and County of Los Angeles, in said State of California, within said Western Defense Command,

or anywhere in the United States, then immediate and impending, requiring or justifying such orders.

On the contrary, the plaintiff alleges that the sole reason for the issuance of said orders was to harass and persecute the plaintiff because of his religious and economic views.

XIII.

The defendants have, since April 14, 1943, enforced and are enforcing said orders at the present time, and they have threatened, and they intend to, carry out and enforce said orders and each of them; and will unless restrained from so doing by order of this Court, carry out and execute each of said orders.

The execution of said orders up to the present time have damaged the plaintiff in a sum in excess of \$3,000.00, exclusive of interest and costs; and the execution of said orders as threatened will in addition damage the plaintiff in a sum in excess of \$3,000.00, exclusive of interest and costs, and more particularly in the following respects and particulars:

1—The Exclusion Order

The Order of Exclusion aforesaid has the effect of com- [11] pletely prohibiting the plaintiff from practicing his present occupation for the reason that at the present time there are no opportunities for the plaintiff to follow his said occupation as a photographer and photo technician in any community outside of the Western Defense Command, and from all of said area plaintiff is by said order excluded. That said Order of Exclusion will make

it impossible for the plaintiff to secure employment in his profession or trade; that the plaintiff is an experienced photographer and photo technician, has earned and is capable of earning a salary of \$200.00 or more per week; that the enforcement of said Order will deprive the plaintiff of the right to follow his profession to earn a livelihood.

Additionally the enforcement of said Order will abridge the constitutional rights of the plaintiff, including:

a—The right of the plaintiff to freedom of religion, freedom of speech, freedom of the press, freedom of assemblage, and the right to petition the Government for a redress of grievance.

b—The plaintiff's right to a fair and full hearing, to be informed of the nature or cause of any accusation against him, to a presentment or an indictment of a grand jury, to a public trial, to a trial by jury, and to counsel.

c—The right of the plaintiff to establish and maintain a home, the right to free movement; and the right to equality of treatment under the law and to be free from discrimination and persecution solely because of his religious and economic views; said rights and each of them are of a value in excess of \$3,000.00, exclusive of interest and costs.

The restraint imposed upon the plaintiff by virtue of said letter order has up to the present time resulted in damage to the plaintiff in a sum in excess of \$3,000.00 and costs; and the continuing enforcement of said orders will result in further damage to the plaintiff. [12]

Additionally, the plaintiff has been damaged in a sum in excess of \$3,000.00, exclusive of interest and costs, because said letter order constitutes an abridgement of the rights of the petitioner as guaranteed by the United States Constitution.

XIV.

The plaintiff has already suffered irreparable injury by the enforcement by the defendants of the orders aforesaid, and will continue to suffer irreparable injury by virtue of the enforcement of said orders, unless said enforcement is restrained by orders of this Court. Plaintiff does not have an adequate remedy at law.

XV.

The acts of the defendants aforesaid, and the threatened acts of the defendants as hereinbefore stated have abridged and threaten to abridge, respectively, the following constitutional rights of the plaintiff:

1—The First Amendment—The right of the plaintiff to freedom of religion, freedom of speech, freedom of the press, freedom of assemblage, and the right to petition the Government for a redress of grievances.

2—The Fifth Amendment—the rights to liberty and property and more particularly, the right to earn a livelihood and engage in his profession or trade, the right to establish and maintain a home, the right to free movement, and the right to equality of treatment under the law and to be free from dis-

crimination and persecution solely because of religious and economic views.

3—The Sixth Amendment—The rights to a fair and full hearing, to be informed of the nature or cause of any accusation against him, to a presentment or an indictment of a grand jury to a public trial, to a trial by jury, and to counsel.

For a Separate and Further Cause of Action, Plaintiff Alleges That: [13]

I.

Plaintiff here repeats each and every allegation contained in the first cause of action as if fully set forth herein in this second cause of action.

II.

The acts of the defendants in issuing and enforcing the orders aforesaid were committed maliciously, wantonly, oppressively, and in a reckless disregard of the rights of plaintiff, by virtue whereof the plaintiff is entitled to punitive damages.

III.

Plaintiff has sustained actual damages by reason of the deprivation of his constitutional rights, and of mental pain, anguish and suffering, and damage to his reputation, in the sum of \$50,000.00.

Wherefore, plaintiff prays for relief as follows:

1—For an order of this Court adjudging and decreeing the military orders aforesaid to be void and unconstitutional; and that said orders abridge the constitutional rights of the plaintiff as particularly hereinabove set forth.

2—For a temporary restraining order restraining and enjoining; for a preliminary injunction pending the final determination of this action restraining and enjoining; and for a permanent injunction perpetually restraining and enjoining the defendants and each of them, and their and each of their agents, servants and representatives directly or indirectly by any means, method or device whatsoever from executing or causing to be executed or compelling plaintiff to execute said orders.

3—That an order to show cause issue to defendants directing them to show cause why a preliminary injunction pendente lite should not issue, restraining the defendants pendente lite, as above set forth. [14]

4—That the defendants be ordered to pay to plaintiff as actual damages, the sum of \$50,000.00; and as exemplary damages, the sum of \$5,000.00, together with costs of this action.

5—For such other and further relief as to this Court seems just and proper.

LORRIN ANDREWS

Attorney for Plaintiff

Verified: Kenneth Alexander

Date: May 1, 1943

Notary: Porter Blackburn [15]

EXHIBIT A

In reply address not the signer of this letter, but Bureau of Navigation, Navy Department, Washington D. C.
Refer to No.

Nav—631—HHC

MM

Navy Department
Bureau of Navigation
Washington, D. C.

26 September 1939

Dear Sir:

Your letter of recent date has been made a part of your service record, and the offer of your services is appreciated. Should the necessity arise, your offer and qualifications will be given due consideration.

During this limited national emergency however, the age limit for reenlisting ex-service men who have been separated from active service more than eight years, has been set at thirty-five years. It is not believed that it will be necessary to call upon you for your services.

It is regretted that a more favorable reply can not be given.

Sincerely yours,

C. W. NIMITZ,

Chief of Bureau.

C. C. HARTMAN

C. C. Hartman

By direction.

Mr. Kenneth Alexander,
Post Office Box 181,
Station S,
Los Angeles, Calif. [16]

EXHIBIT B

333 South Hope Street,
Los Angeles, California.

October sixth 1940.

To. The War Department,
Washington . D C .

Subject . Use of services of veteran of world war .

The writer holds an honorable discharge from the United States Army, also one for United States Navy. He served in France for ten months in the Naval Aviation branch of the Navy. He held the rate of Chief Petty officer, and was recommended for a commission.

He did expert photographic work, was instrumental in establishing photographic headquarters in various camps, did mapping, and inspecting the

installation of photographic equipment in air services. He is at this moment an expert photographer, including color processes.

In France he became familiar with this work under active war conditions, when attached to the Northern Bombing groupe in that country.

He is now in good health, is forty eight years of age, is competent to instruct men, and to handle them.

Information is respectfully requested regarding any provisions that may have been made regarding men with this qualification.

Respectfully.

KENNETH ALEXANDER. [17]

EXHIBIT C

Address reply to
Chief of the Air Corps
War Department
Washington, D. C.

War Department
Office of the Chief of the Air Corps
Washington

December 22, 1941

Mr. Kenneth Alexander,
333 South Hope Street,
Los Angeles, California.

Dear Sir:

This will acknowledge receipt of your letter of December 9, 1941, regarding status in respect to

your application for appointment in the Army of the United States.

Your application has been referred to this office and at the present time is being processed here. When a decision has been reached, you will be advised by the Adjutant General.

It is regretted that a more informative reply cannot be made at this time.

Yours very truly,

L. B. HICKAM

L. B. Hickam,

Major, Air Corps,

Assistant Chief,

Military Personnel Division.

[18]

EXHIBIT D

333 South Hope Street

Los Angeles, California.

Dec. 8th 1941

Headquarters,

Air Force

United States Army

Washington D. C.

Information is respectfully requested, regarding condition of the undersigned, in respect to his application for appointment in the U. S. Army reserve.

All forms have been filled out and forwarded, and medical examination completed at March field, last October.

Letter giving my own report of my experience and believed qualifications is already on file.

I am anxious to serve my Country in this war.

Respectfully,

KENNETH ALEXANDER. [19]

EXHIBIT E

(Office Copy)

Headquarters Western Defense Command and
Fourth Army

Individual Exclusion Hearing Board

Presidio of San Francisco, California.

February 27, 1943.

To Kenneth Alexander,

333 South Hope St., Los Angeles, Calif.

1. A Board of Officers has been appointed by the Commanding General, Western Defense Command and Fourth Army (pursuant to Executive Order 9066 dated February 19, 1942, instructions of the Secretary of War) to consider whether military necessity requires that you be ordered excluded from certain Military Areas of the Western Defense Command of the Southern Defense Command and of the Eastern Defense Command which areas are defined in Public Proclamation issued by the Commanding Generals of the respective Commands.

2. The Board of Officers will be convened on Thursday the 11th day of March, 1943, at the hour of 1:30 P. M. at Room 216, Rowan Building, 458 S. Spring St., Los Angeles, California. You may, if you so elect, appear before it at that time and place, and you will be informed of the general

nature and scope of the inquiry and afforded an opportunity to present evidence in your own behalf and to answer questions or make a statement under oath or affirmation. Material in the hands of the Board will not be made available for your inspection.

3. It is requested that you notify the Board in writing at least 24 hours prior to the hearing whether you will appear.

4. The following are pertinent regulations regarding the conduct of the investigation:

a. All matters pertaining to the inquiry are confidential and no publicity will be given by the Board.

b. Your appearance before the Board is optional on your part. [20]

c. You may be accompanied by counsel to act as your personal advisor; he will not be heard by the Board, nor will he be permitted to examine witnesses. In general, the interrogation of witnesses will be conducted by the Recorder, on behalf of yourself and of the Board.

d. You may refuse to answer any question asked by the Board, without assigning any specific reason for your refusal.

e. Any evidentiary statements by you to the Board must be under oath or affirmation.

f. The inquiry by the Board is in no sense a criminal proceeding; you are not charged with the commission of any penal offense. For your information, Congress has by the enactment of Public Law No. 505, 77th Congress, approved March 21,

1942 (56 Statutes at Large, p. 240) provided penalties for the violation of an order of exclusion. The act in question reads as follows:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed under the authority of an Executive Order of the President by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area, or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order, [21] and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.”

(Signed) RANDELL LARSON,

Randell Larson

Lt. Col. F.A.

Recorder. [22]

EXHIBIT F

Headquarters Western Defense Command and
Fourth Army

Presidio of San Francisco, California
Individual Exclusion Order.

April 14, 1943

No. 1K-7

To Kenneth Alexander,
333 South Hope Street
Los Angeles, California.

Under authority of Executive Order No. 9066, February 19, 1942, and letter of the Secretary of War, February 20, 1942, and pursuant to a determination that the present action is dictated by military necessity, you are hereby prohibited, after the expiration of ten days from 12:00 o'clock midnight of the day you receive this order, from being in, remaining in, or entering into military *Military* Areas Nos. 1 and 2 (comprising the States of Arizona, California, Oregon and Washington) Western Defense Command, as established by Public Proclamations Nos. 1 and 2, this headquarters, dated March 2, 1942, and March 16, 1942, respectively, and any amendments thereon. This prohibition extends to any zones or areas, which may hereafter be similarly designated, defined and established, but as to such additional zones or areas a period of ten days from and after the date of the proclamation establishing such additional zones or areas is permitted you to comply with this prohibition. This prohibition shall continue in force until revoked in writing by competent authority.

Under authority of Executive Order No. 9066, February 19, 1942, and letter of the Secretary of War, July 15, 1942, and pursuant to determination that the present action is dictated by military necessity, you are also hereby prohibited from entering into, being in, or remaining in, at any time from and after midnight of the date upon which you receive this order, Eastern Military Area, comprising the States of Maine, New [23] Hampshire, Vermont, North Carolina, South Carolina, Georgia the District of Columbia and part of the State of Florida, as defined and designated by Proclamation No. 1, dated May 16, 1942, Headquarters, Eastern Defense Command and First Army, Governor Island, New York, H. A. Deum, Lieutenant General, U. S. Army, Commanding, and from entering into, being in, or remaining in, from and after said time and date, Military Area No. 1 of Florida, Military Area No. 1 of Alabama, Military Area No. 1 of Mississippi, Military Area No. 1 of Louisiana, Military Area No. 1 of Texas and Military Area No. 1 of New Mexico, as defined and designated by Public Proclamation No. 1, dated May 30, 1942, Headquarters, Southern Defense Command, San Antonio, Texas, Walter Krueger, Lieutenant General, U. S. Army, Commanding.

Within forty-eight hours after service upon you of this order you are required to report in person to a representative of this headquarters at such place as may be designated by the person serving this order, to make compliance herewith, and at

that time to have your photograph, finger prints and a specimen signature taken.

Prior to your departure in compliance herewith, you will communicate in writing to Wartime Civil Control Administration, Western Defense Command and Fourth Army, 1251 Market Street, San Francisco, California, the time of your proposed departure, initial and ultimate destinations, route to be followed and mode of travel, upon arrival at ultimate destination, you will, in person, report the fact of your arrival and your address at such destination to the Special Agent in Charge of the nearest office of the Federal Bureau of Investigation, Department of Justice.

Failure to comply with the foregoing will subject you to the criminal penalties by Public Law No. 505, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty [24] for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones."

(Signed) J. L. DeWITT

J. L. DeWitt

Lieutenant General,

U. S. Army Commanding.

A True Copy

(Signed) HUGH T. FULLERTON,

Hugh T. Fullerton

Major, A.G.D.,

Assistant Adjutant General.

[Endorsed]: Filed May 7, 1943 [25]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR INJUNCTION
PENDENTE LITE

To the Above-Named Defendants, and to Leo V. Silverstein, Esq., United States Attorney for the Southern District of California:

You, and Each of You, Will Please Take Notice that on the 24th day of May, 1943, at 10:00 o'clock A.M., the plaintiff will move the above-entitled Court, in the Court room of Honorable Peirson M. Hall, Judge of said Court, for an Order enjoining the defendants, and each of them, pendente lite, directly or indirectly, from executing, or causing to be executed, those certain [26] orders denominated in the plaintiff's complaint as Exclusion Order dated April 14th, 1943.

The plaintiff will rely upon the complaint on file in the above-entitled cause, the Points and Authorities heretofore filed.

Dated, this 11th day of May, 1943.

LORRIN ANDREWS

Attorney for Plaintiff

[Endorsed]: Filed May 18, 1943 [27]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO DENY
PLAINTIFF'S APPLICATION FOR A
MOTION PENDENTE LITE AND TO
STRIKE CERTAIN PORTIONS OF PLAIN-
TIFF'S COMPLAINT, AND TO DISMISS
PLAINTIFF'S COMPLAINT

To: Kenneth Alexander and Lorrin Andrews, Esq.

Please Take Notice that in the United States Court Room of the Honorable Peirson M. Hall, Judge of said Court, at the Post Office and Court-house Building in the City of Los Angeles, on the 24th day of May, 1943, at the opening of the court on that day or as soon thereafter as counsel can be heard, the United States of America, appearing in behalf of the defendants Lt. Gen. John L. DeWitt and R. B. Hood, by Leo V. Silverstein, United States Attorney for the Southern District of California, and Wm. W. Worthington, Assistant United States Attorney for said district, will move the above-entitled court:

A. To deny the motion of plaintiff herein for an injunction pendente lite against said defendants Lt. Gen. John L. DeWitt and R. B. Hood from directly or indirectly executing or causing to be executed a certain Order denominated in plaintiff's complaint as Exclusion Order, dated April 14, 1943.

[28]

B. 1. To strike from line 23 of paragraph II, on page 2, of plaintiff's complaint, beginning with the word "plaintiff" through the word "profession"

in line 9 of said paragraph II, on page 4 of plaintiff's complaint.

2. To strike from line 13 of paragraph VI, on page 6 of plaintiff's complaint, beginning with the words "the said Board" to the end of paragraph VI, on page 7 of plaintiff's complaint.

3. To strike all of paragraph VIII on pages 7 and 8 of plaintiff's complaint.

4. To strike all of paragraph IX on page 8 of plaintiff's complaint.

5. To strike all of paragraph XI on page 9 of plaintiff's complaint.

6. To strike all of paragraph XII on pages 9 and 10 of plaintiff's complaint.

7. To strike from line 25 of paragraph XIII on page 10 of plaintiff's complaint, beginning with the words "The execution" through the word "livelihood" on page 11 of said paragraph XIII of plaintiff's complaint.

8. To strike from line 27 of paragraph XIII of plaintiff's complaint, beginning with the words "said rights" on page 11, through to the end of said paragraph XIII.

9. To strike so much of paragraph I of plaintiff's Separate and Further Cause of Action as by reallegation alleges the above stated portions of the First Cause of Action.

10. To strike all of paragraphs II and III of plaintiff's Separate and Further Cause of Action.

C. To dismiss the above-entitled action as to the defendants Lt. Gen. John L. DeWitt and R. B.

Hodd, on the ground that plaintiff has failed to state a claim as to them upon which relief can be granted.

Said motions are based upon the points and authorities attached hereto and hereby incorporated herein by reference, and other documents [29] and papers on file in this action, and which may hereafter be filed in this action.

Dated this day of May, 1943.

LEO V. SILVERSTEIN

United States Attorney

WM. W. WORTHINGTON

Assistant U. S. Attorney

[Endorsed]: Filed May 24, 1943 [30]

At a stated term, to wit: The February Term, A. D. 1943 of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 25th day of May in the year of our Lord one thousand nine hundred and forty-three.

Present:

The Honorable: Peirson M. Hall, District Judge

[Title of Cause.]

This cause coming on for hearing on plaintiff's motion for injunction pendente lite, pursuant to noticed filed May 18, 1943, and hearing on defend-

ants' motion to deny plaintiff's application for an injunction pendente lite, to strike portions of plaintiff's complaint, and to dismiss said complaint; Lorrin Andrew, Esq., appearing on counsel for plaintiff; Leo V. Silverstein, U. S. Attorney, and W. W. Worthington, Assistant U. S. Attorney, appearing for the defendants; James J. Marquardt, Court Reporter, being present and reporting the proceedings.

On motion of Attorney Andrews, it is ordered that Avery Blount, Esq., be associated as counsel for the plaintiff and that A. L. Wirin, Esq. be allowed to appear herein as *amicus curiae*.

Attorney Andrews makes a statement in support of said motion for injunction until this case can be heard on its merits, and on motion of said Attorney Andrews the second cause of action is ordered stricken.

Attorney Wirin makes a statement to the effect that the summons served upon the plaintiff by the military is comparable to an indictment and a sentence, as well as a threat to exclude the plaintiff from the State of California. [31]

Attorney Silverstein offers U. S. Exhibits Nos. 1, 2, 3 and 4, which are ordered admitted into evidence for the purpose of the Court taking judicial notice thereof.

The Court orders items B-1, 2, 3, 5, 6, 7 and 8 of Government's motion to strike from the complaint denied, and that item B-4 is granted in part, and stricken beginning with the words "* * * that the

order of exclusion * * *” to the end of the paragraph; that items 9 and 10 be granted on motion of plaintiff, and as to the prayer of the complaint, paragraph 4 thereof is ordered stricken on motion of the plaintiff.

Attorney Silverstein argues in opposition to motion for injunction pendente lite.

It is ordered that motion for injunction pendente lite be, and it hereby is, denied, and that the complaint be, and it hereby is, dismissed; counsel for plaintiff to prepare judgment of dismissal.

33/667-8 [32]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 2909—P.H.

KENNETH ALEXANDER,

Plaintiff,

vs.

LT. GEN. JOHN L. DE WITT, RANDELL LAR-
SON, LT. COL., F. A., R. B. HOOD, Special
Agent in Charge of Federal Bureau of Inves-
tigation, United States Department of Justice,
at Los Angeles, California, HUGH T. FUL-
LERTON, Major, A. G. D., Assistant Adjutant
General, L. G. WHITE, Investigator for Head-
quarters Western Defense Command and
Fourth Army, L. F. SLOAN, Area Supervisor,
War Relocation Authority, DOE ONE, DOE
TWO and DOE THREE,

Defendants.

JUDGMENT

Plaintiff moved for an Injunction Pendente Lite
in the above entitled matter.

No service of process or notice was had upon
any of the defendants, but by agreement between
plaintiff's counsel and the United States Attorney
for the Southern District of California, acting on
behalf of Lt. General John L. De Witt, Commanding
General of the United States Army of the Western
Defense Command and Fourth Army, and R. B.

Hood, Special Agent in Charge of the Federal Bureau of Investigation of the United States Department of Justice located at Los Angeles, California, said motion came on for hearing on the 25th day of May at the hour of 9:30 o'clock in the morning, at which time there [33] also came on for hearing motions of said defendants De Witt and Hood to strike portions of said complaint, and a motion of said last named defendants to dismiss said action on the ground that the complaint did not state sufficient facts to constitute a cause of action.

Plaintiff appeared by his counsel, Lorrin Andrews, and said defendants Lt. General John L. De Witt and R. B. Hood were represented by Hon. Leo V. Silverstein, United States Attorney and W. W. Worthington, Assistant United States Attorney. A. L. Wirin upon motion appeared as Amicus Curiae.

On plaintiff's motion, the second cause of action set forth in plaintiff's complaint was ordered dismissed.

Arguments were then heard from respective counsel, whereupon it was ordered that defendants' motion to strike be granted in part and denied in part; that plaintiff's motion for temporary restraining order and injunction pendente lite be denied, and that motion of defendants De Witt and Hood to dismiss be granted, both on the ground that said complaint does not state a cause of action.

Now, Therefore, it is Hereby Adjudged and Decreed that the within action be and the same

is hereby dismissed as to said defendants Lt. General John L. De Witt, Commanding General of the United States Army of the Western Defense Command and Fourth Army, and R. B. Hood, Special Agent in Charge of the Federal Bureau of Investigation of the United States Department of Justice located at Los Angeles, on the ground that plaintiff's complaint does not state facts sufficient to constitute a cause of action.

Dated at Los Angeles, California, this 15th day of June, 1943.

PEIRSON M. HALL

Judge, United States District
Court.

Judgment entered Jun 15, 1943 Docketed Jun 15, 1943 C. O. Book 17 Page 668 Edmund L. Smith, Clerk, By J M Horn Deputy.

[Endorsed]: Filed Jun 15, 1943 [34]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS UNDER RULE 73-B

Notice Is Hereby Given that Kenneth Alexander, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the order of the District Court of the United States in and for the Southern District of California, Central Division, denying plaintiff's motion for a temporary restraining order and an injunction pendente

lite, and from the order granting the motion of defendants De Witt and Hood to dismiss the complaint against them on the ground that it does not state a cause of action, entered on the 15th day of June, 1943, and from the final judgment entered in this action on the 15th day of June, 1943, as to the [35] defendants, Lt. Gen. John L. De Witt and R. B. Hood, Special Agent in Charge of Federal Bureau of Investigation, United States Department of Justice, at Los Angeles, California.

Dated, this 21st day of June, 1943.

AVERY M. BLOUNT

LORRIN ANDREWS

By AVERY M. BLOUNT

Attorneys for Plaintiff

[Endorsed]: Filed & mailed copy to Charles H. Carr, Atty. for Defts. Jun 25, 1943 Edmund L. Smith, Clerk, By John A. Childress Deputy Clerk
[36]

National Automobile Insurance Company

Bond No. 26821

Home Office — Los Angeles

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents:

That we, Kenneth Alexander, as Principal, and the National Automobile Insurance Company, a cor-

poration organized and existing under the laws of the State of California and authorized to transact a surety business in the State of California, as Surety, are held and firmly bound unto Lt. Gen. John L. DeWitt, Et al, in the full and just sum of Two Hundred Fifty and NO/100 (\$250.00) Dollars, to be paid to the said Lt. Gen. John L. DeWitt, Et al, their certain Attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 24th day of June, in the year of our Lord One Thousand Nine Hundred and Forty-Three.

Whereas, on June 15th, 1943, a Judgment was entered in the District Court of the United States, Southern District of California, Central Division, in the above entitled case and as the Plaintiff, Kenneth Alexander, has filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the State of California.

Now, therefore, the condition of the above obligation is such that if Kenneth Alexander, Plaintiff, shall prosecute his appeal to effect, and answer all costs if the appeal is dismissed or the judgment affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

KENNETH ALEXANDER

Principal.

[Seal]

NATIONAL AUTOMOBILE INSURANCE COMPANY,

By LLOYD H. JOHNSTON,

LLOYD H. JOHNSTON,

Attorney-in-Fact.

Examined and recommended for approval as provided in Rule #13.

The premium charged for this bond is \$10:00 per annum. [37]

State of California

County of Los Angeles—ss.

On this 24th day of June, in the year 1943, before me, M. M. Jackson, a Notary Public in and for said County and State, personally appeared Lloyd H. Johnston known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the National Automobile Insurance Company, and acknowledged to me that he subscribed the name of the National Automobile Insurance Company thereto as principal, and his own name as Attorney-in-fact.

[Seal]

M. M. JACKSON

Notary Public in and for said
County and State.

My Commission Expires April 30, 1947.

[Endorsed]: Filed June 25, 1943 [38]

[Title of District Court and Cause.]

STIPULATION RE EXHIBITS

It Is Hereby Stipulated by and between counsel for the appellant, Kenneth Alexander, and counsel for the appellees, Lt. Gen. John L. DeWitt and R. B. Hood, Special Agent in Charge of Federal Bureau of Investigation, United States Department of Justice, at Los Angeles, California, that all the original exhibits in the above-entitled action shall, by the Clerk of the District Court be forwarded to the Clerk of the Circuit Court of Appeals for the Ninth Circuit.

Dated, this 30th day of July, 1943.

AVERY M. BLOUNT

LORRIN ANDREWS

By LORRIN ANDREWS

Attorneys for Appellant [39]

CHARLES H. CARR

United States Attorney

By JAMES L. CRAWFORD

Asst. United States Attorney,

Attorney for Appellees

It Is So Ordered:

H. A. HOLLZER

Judge of United States District Court

[Endorsed]: Filed July 30, 1943. [40]

[Title of District Court and Cause.]

DESIGNATION OF RECORD TO BE USED
ON APPEAL

A Notice of Appeal having been heretofore filed by the plaintiff in the above entitled cause, for an appeal to the Circuit Court of Appeals for the Ninth Circuit from certain orders and the judgment of the District Court of the United States, in and for the Southern District of California, Central Division, in the above captioned proceedings, the appellant, Kenneth Alexander, now designates the entire record as his record on appeal, said record on appeal to consist of the following listed pleadings, papers, documents and matters: [41]

1—Complaint for Preliminary Injunction and for Damages;

2—Summons issued thereon;

3—Notice of Motion for Injunction Pendente Lite;

4—Defendants' Notice of Motion and Motion to Deny Plaintiff's Application for a Motion Pendente Lite and to Strike Certain Portions of Plaintiff's Complaint, and to Dismiss Plaintiff's Complaint;

5—All Exhibits offered by Defendants herein;

6—All Minute Orders of above entitled Court in respect to above captioned proceedings;

7—Judgment;

8—Notice of Appeal to Circuit Court of Appeals under Rule 73;

9—Bond on Appeal;

10—Designation of Record to be Used on Appeal;

11—All other pleadings and proceedings had herein.

AVERY M. BLOUNT and
LORRIN ANDREWS

By AVERY M. BLOUNT

Attorneys for Plaintiff and
Appellant

Received copy of the within Designation of Record etc. this 2 day of July, 1943 Charles H. Carr, U. S. Atty. By MacKay.

[Endorsed]: Filed July 2, 1943 [42]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 42 inclusive contain full, true and correct copies of: Complaint for Preliminary Injunction and for Damages; Notice of Motion for Injunction Pendente Lite; Notice of Motion and Motion to Deny Plaintiff's Application for Injunction Pendente Lite and to Strike Certain Portions of Plaintiff's Complaint, and to Dismiss Plaintiff's Complaint; Minute Order Entered May 25, 1943; Judgment; Notice of Appeal; Cost Bond on Appeal; Stipulation and Order; and Designation of

Record on Appeal, which, together with the Original Exhibits transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for comparing, correcting and certifying the foregoing record amount to \$7.30 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 2 day of August, 1943.

[Seal] EDMUND L. SMITH, Clerk

By THEODORE HOCKE

Deputy Clerk.

[Endorsed]: No. 10514. United States Circuit Court of Appeals for the Ninth Circuit. Kenneth Alexander, Appellant, vs. Lt. General John L. De Witt, Commanding General of the United States Army of the Western Defense Command and Fourth Army, and R. B. Hood, Special Agent in Charge of the Federal Bureau of Investigation of the United States Department of Justice located at Los Angeles, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed August 3, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10514

KENNETH ALEXANDER,

Appellant,

vs.

LT. GEN. JOHN L. DeWITT and R. B. HOOD,
Special Agent in Charge of Federal Bureau of
Investigation, United States Department of
Justice, at Los Angeles, California,

Appellees.

STATEMENT OF POINTS TO BE RELIED ON
BY APPELLANT AND DESIGNATION OF
RECORD ON APPEAL

1. That the complaint filed in the above-entitled action by the plaintiff and appellant set forth a good and sufficient cause of action against the defendants Lt. Gen. John L. DeWitt and R. B. Hood, Special Agent in charge of Federal Bureau of Investigation, United States Department of Justice, at Los Angeles, California, and should not have been dismissed as insufficient as to said defendants.

2. That the military tribunal which entered an order deporting the appellant was not a competent tribunal for the trial or judgment of the appellant and acted in violation of the 4th, 5th and 6th Amendments to the Constitution of the United States.

3. That the petition of the appellant for an injunction pendente lite, together with the pleadings

in said cause, entitle said appellant to a temporary injunction restraining the defendants and appellees from enforcing the order of the military tribunal, pending the trial of this suit.

Appellant hereby adopts as his designation of the record on appeal in the instant case that certain "Designation of Record to be used on Appeal" heretofore filed in the District Court of the United States in and for the Southern District of California, Central Division, on or about July 1, 1943.

Dated, this 31st day of July, 1943.

KENNETH ALEXANDER,

Appellant

By LORRIN ANDREWS and
AVERY M. BLOUNT

By LORRIN ANDREWS,
His Attorneys.

Received copy of the within Statement of Points to be Relied On by Appellant and Designation of Record on Appeal this 31st day of July, 1943.

CHARLES H. CARR

United States Attorney

By R. Mac KAY,
Asst. U. S. Attorney.

[Endorsed]: Filed Aug. 3, 1943. Paul P. O'Brien,
Clerk.

No. 10514

United States
Circuit Court of Appeals

For the Ninth Circuit.

KENNETH ALEXANDER,

Appellant,

vs.

LT. GENERAL JOHN L. DE WITT, Commanding
General of the United States Army of the West-
ern Defense Command and Fourth Army, and
R. B. HOOD, Special Agent in Charge of the
Federal Bureau of Investigation of the United
States Department of Justice located at Los
Angeles,

Appellees.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

In the District Court of the United States in and
for the Southern District of California, Central Division

No. 2909—PH Civil

KENNETH ALEXANDER,

Plaintiff,

vs.

LT. GEN. JOHN L. DeWITT, RANDELL LARSON, LT. COL., F. A., R. B. HOOD, Special Agent in Charge of Federal Bureau of Investigation, United States Department of Justice, at Los Angeles, California.

Defendants.

ORDER FOR SUPPLEMENTAL RECORD

Pursuant to Rule 75(h), Rules of Civil Procedure, and upon the suggestion of Charles H. Carr, United States Attorney, Attorney for the above-named defendants who are appellees on appeal of said case, and it appearing to this Court that the reporter's transcript of proceedings dated May 25, 1943 in said cause, material to the case of said appellees, has been omitted from the record on appeal by accident, and in order that the said record on appeal may truly disclose what occurred in the District Court;

It Is Therefore Ordered that the Clerk of the United States District Court, Southern District of California, correct said omission by a supplemental transcript to include the said reporter's transcript of proceedings dated May 25, 1943,

same to be certified and transmitted by the Clerk of the District Court to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 20th day of October, 1943.

PEIRSON M. HALL

Judge of the United States
District Court.

Presented by:

JOHN M. GAULT

Assistant U. S. Attorney

[Endorsed]: Filed Oct. 20, 1943.

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing two pages contain a full, true and correct copy of: Order for Supplemental Record, which together with the Original Reporter's Transcript transmitted herewith and the Transcript of Record heretofore transmitted to the Circuit Court of Appeals constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 21st day of October, 1943.

[Seal]

EDMUND L. SMITH,

Clerk

By THEODORE HOCKE

Deputy Clerk.

HEARING ON PLAINTIFF'S MOTION FOR
INJUNCTION PENDITE LITE, PUR-
SUANT TO NOTICE FILED MAY 18, 1943.

Los Angeles, California

May 25, 1943.

Appearances:

For the Plaintiff:

Lorin Andrews, Esq.,
326 West Third Street,
Los Angeles, California,
and

Avery M. Blount, Esq.,
311 South Spring Street,
Los Angeles, California.

For the Defendants:

Leo V. Silverstein, Esq.,
United States Attorney.

Amicus Curiae:

A. L. Wirin, Esq.,
257 South Spring Street
Los Angeles, California.

Before the Honorable Pierson M. Hall. [1*]

* Page numbering appearing at top of page of original Reporter's Transcript.

Los Angeles California,
Tuesday, May 25, 1943.
9:30 A. M.

The Clerk: Alexander vs. DeWitt, hearing on plaintiff's motion for Injunction Pendente Lite, pursuant to notice filed May 18, 1943.

Mr. Andrews: Ready.

Mr. Silverstein: Ready.

Mr. Andrews: Shall I begin the proceeding on the motion, your Honor?

The Court: All right.

Mr. Andrews: Mr. Silverstein has a motion.

If the Court pleases, as your Honor knows, of course, from the pleadings, the action is for a permanent injunction against the military order of General DeWitt and certain other officers, and the motion before your Honor is asking that we have an injunction or restraining order pendente lite not to take this matter out of the jurisdiction of the Court until the case can be heard on its merits. As a matter of fact, there is no denial of the allegations of the complaint filed by the Government; therefore, in arguing this motion, we will take it, of course, for granted that the statements made in our complaint are correct; that here is a man who, without any notice of any charge against him, not knowing yet what he has been convicted of, with all the matters that are set forth there, the fact that he was not permitted counsel, he was not permitted the evidence against [2] him, he was not notified on what charge he

was tried, he was simply notified summarily that he had to leave certain States of the Southern and I believe Western and one other department, which are purely arbitrary departments which in the War had been set up as military divisions; but there was no military law; there is no martial law, the Courts are functioning, not only your Honor's Court, but every Federal Court and every State Court is functioning. If this man had violated the law in some particular, there was plenty of authority to bring him before the State Courts. The grand jury was in session, informations could be filed, he could be arraigned, and a great many remedies that any citizen of the United States has to protect himself from unjust accusation could be made. Here is a civil citizen, your Honor understands; he has nothing to do with the Military authorities whatsoever, or the Naval authorities, or any Government employees; he is just a citizen, like any of us here, and he is cited to appear before an arbitrary commission, and it is decided that he must leave by that commission, without giving him any of the rights that are protected by the Bill of Rights or the Amendments to the Constitution of the United States. As a matter of fact, the duties and rights of the President of the United States, which are set forth in Article II of the Constitution are limited by that order. He is not a dictator like some of our European authorities. We are in a Democracy and the [3] President has certain authorities that are given

him by the Constitution of the United States, and no other.

Now, it seems to me that the case sets itself on two points. Second, was the Military Commission that has taken upon itself to convict the plaintiff and order him out of the State of California a competent tribunal for the trial of the plaintiff; and, if it is not a competent tribunal, is our application to your Honor for a restraining order the proper remedy in the case, both the permanent and the temporary?

Now, if the Court pleases, I am going to make two propositions——

The Court: Just a moment, Mr. Andrews.

Mr. Andrews: ——that we strike out——

The Court: Oh, you are going to what?

Mr. Andrews: I am going to make two propositions in this matter. We strike out our second cause of action, which is a suit for damages. On discussion with the other counsel in the case, I ask leave to associate Mr. Avery Blount as attorney for the plaintiff in this case, and Mr. Wirin, who is appearing as *Amicus Curiae*.

Mr. Wirin: I am asking for permission to.

The Court: Permission is granted. Any objection?

Mr. Silverstein: No.

The Court: It is granted. I am like the Virginia Judge. I rule first. [4]

Mr. Andrews: I am going to strike that. I will ask permission to strike the second cause of action, for damages.

The Court: As well as the allegation in the first cause of action about the amount of damages?

Mr. Andrews: Actual damages, no, but the damages we set up——

The Court: All right, you strike the second cause of action?

Mr. Andrews: Yes.

The Court: That motion is granted.

Mr. Andrews: Now, there are one or two little corrections.

The Court: The point you made a moment ago—you said there were two points.

Mr. Andrews: Yes.

The Court: One whether or not the tribunal was lawfully created.

Mr. Andrews: Yes. Was it a tribunal that could try civilians?

The Court: Yes.

Mr. Andrews: There is no such thing in the Constitution of the United States providing for a military tribunal to try citizens; otherwise, if that were so, the President of the United States would soon become a dictator, because all he would have to do is have military districts under a declaration of Congress—set it into military districts, [5] and then if he didn't approve of his Judges or Governors or anything else—when I say "his", I mean Governors of States of the United States—he could try them before a military tribunal. There is nothing of that kind here. It is not permitted by the Constitution as I look over it.

My second point is whether it would be proper for your Honor——

The Court: Let us assume that I should find that under the Constitution or the law as set up they had the power to create this tribunal; would the second question be then whether or not they had granted a hearing?

Mr. Andrews: No. We have said that they didn't grant a hearing.

The Court: I mean, suppose that I should hold that the tribunal was lawful.

Mr. Andrew: Yes, your Honor.

The Court: Would the question be in the case then whether or not they had actually granted a hearing?

Mr. Andrews: Yes; whether he had had a hearing as defined by the decisions of the Federal Courts, and especially the Supreme Court.

The Court: All right, go ahead.

Mr. Andrews: And, secondly, whether or not it is proper for the Courts to grant a temporary injunction pendente lite.

My second point is this. We are perfectly willing to [6] go to trial on the merits of this case as soon as your Honor can give us a date. There is no attempt to delay the facts of any kind if we are not stating the facts in our complaint. We are ready to go to trial on the facts. If the Government can find out any other facts that would make our man a criminal that had to be seized for the safety of the community, and the necessity arising therefor, that he had to be, as a military

necessity, and that he had to be immediately taken out, then, if the Court pleases, we are willing to go to trial and hear all those facts and refute them, if we can. So we are not asking for a delay, other than your Honor's convenience in trying this case, and we will be ready at any time your Honor says is a proper time that you could give us a hearing on the facts. Now, in the meantime we don't want our client to disappear, naturally. We have got to consult with him. We have got to prepare. If the prosecution files an answer charging him with any offense of any kind that the military tribunal would, in law, have the right to do, we want to have our client here and, therefore, we are asking for a temporary injunction. Now the question is whether, under the authorities, your Honor can grant such an injunction; whether an injunction can be granted against a Federal official who is violating the law in his own person.

Now, as I say, referring to the facts, there is no proof whatsoever that this man could not be tried if he [7] violated any law of the State or Federal courts; they are open, they are ready to hear all grievances, and no citizen of the United States not in the Military force of the United States or the Naval forces can be tried, if the Court pleases, by any but the Courts of the State. That is set forth not only in the Constitution and in the Bill of Rights, but it is set forth in the decisions of the Courts, which I will come to later.

Then, secondly, has the President any authority to supersede the Federal Courts or the State

Courts, especially his own Federal Courts by setting up a new tribunal which will override them; such as, as I say, if the General in command should feel that for some reason, possibly because I defend somebody that he doesn't like, that I should be put of this jurisdiction, and just order me before him and ask me my name, and say "We have decided to put you out"; can that be done? Because if it can be done with me, a very insignificant member, it can be done with anybody else, any other citizen, including the officials. Now, if that is true, then we haven't got a Democracy here. That is exactly what the Constitution and Bill of Rights prevented, and the Supreme Court has declared over and over again, as I will cite to your Honor in a few minutes.

I understand your Honor has another hearing here, so I am going to be very brief. I am just going to be sketchy, unless your Honor cares to hear me at greater length. [8]

As I say, this man is not in any way connected with Military or Naval forces. He is not tried for an offense against the Military or naval. There is no proof that there is the necessity here for an order from the Military commission or from the President. It is true that an Act was created, I think it is nine thousand——

The Court: Have you a copy of that Act?

Mr. Andrews: 9066.

Mr. Silverstein: 9066?

The Court: Yes.

Mr. Silverstein: Yes, your Honor.

The Court: An extra copy?

Mr. Silverstein: Here is a typewritten copy, and I also have it in the Congressional Service. I have it typewritten.

The Court: Either one.

Mr. Wirin: There is an Act of Congress and an Executive Order, I think it should be clear.

The Court: I want the Act of Congress. This is the Executive Order you are speaking of now?

Mr. Silverstein: Yes.

The Court: I want the Act of Congress.

Mr. Silverstein: Public Law 503?

The Court: Yes.

Mr. Silverstein: This is in 18, 97-A of the Code.

The Court: Title 18, 97-A. [9]

Mr. Silverstein: I have it here, your Honor. Will you pardon me just a minute?

The Court: Is that the second War Powers Act?

Mr. Silverstein: No. This is Public Law 503. Your War Powers Act is different. That is in the Code too.

The Court: Yes. All right. This is Title 18, Section 97, is that it?

Mr. Silverstein: That is Public Law 503. That is in 18, 97-A.

Mr. Andrews: Now, it doesn't matter a rap who this man is, as far as this case is concerned. He might have violated a number of laws. He might have murdered somebody or committed rape or robbed a bank. That doesn't alter the fact that he did not have a trial in appearing before a commis-

sion which under any Act has no power to supersede the State Courts.

Now, the great case, of course, in all these matters is *Ex Parte Milligan*, which was tried in 1864; that is, a military order was issued deporting Milligan, if I remember correctly, and it came before the Supreme Court in 1866 and had a tremendous array of very able counsel there, and it was held that the Military commission, so-called, had no rights whatsoever to interfere with a civilian. Of course it is a very well known case that your Honor knows as well as I do. It is the authority.

We also have another case that came before the Supreme [10] Court a few years ago. The Governor of the State of Texas declared Military law and the seizing of certain properties, and the Supreme Court there set forth at great length a very able decision. I would like to read you short sections from those two decisions.

The Court: I read that last night. I read the Constantin case last night. I haven't read Milligan for some time, but don't read all that now.

Mr. Andrews: Let me read what Chief Justice Chase said: I have extracted a paragraph.

The Court: All right.

Mr. Andrews: "The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits"—

In that case absolute charges were made against him, absolute charges, and he had a hearing before a Military commission.

“——and the petition and exhibits in the record which must be taken as true admit his guilt, but whatever his desert of punishment may be, it is more important to the Court and to every citizen that he should not be punished under an illegal sentence than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict even on the guilty unauthorized though merited justice. The trial and sentence of Milligan were by Military com- [11] mission convened in Indiana during the fall of 1864. The action of the commission had been under the consideration of President Lincoln for some time when he himself became the victim of an abhorred conspiracy.”

Then, if the Court pleases, it goes on to say that President Johnson did approve the findings of the commission and it says that he had no right to, and it goes, on, as your Honor well knows, of course, and exonerates Milligan in that case.

Now, then, with your Honor's permission, I will read one paragraph from the case of Constantin.

“The proposition is this: That in a time of war the Commander of an Armed Force (if in his opinion the exigencies of the country demand it, and of which he is to be the judge), has the power, within the lines of his Military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*——” italicized in the decision— “and in the exercise of his authority cannot be restrained except by a superior officer or the President of

the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of these can, if he chooses, within his limits, on a plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, [12] and punish all persons as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law established on such a basis destroys every guarantee of the Constitution and effectually renders the Military independent and superior to the civil power. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in conflict, one or the other must perish”.

Then the Supreme Court goes on to say that, of course, there is no such right for a military officer to do that.

Now, then, if the Court pleases, there are other authorities, but those two, I think, cite the important authorities I would like to call to your Honor’s attention.

Now, then, what can we do? What can the Court do? In *Waite vs. Macy*, 246 U. S., the Syllabus says, the board of general appraisers will be enjoined from enforcing a rule promulgated by the Secretary of the Treasury which necessitates the exclusion of an imported tea, without a hearing

and without a trial. They just excluded them. And it was held that the proper thing was an injunction issued by the Federal Court to stop them from enforcing any such order without a hearing, which the persons who imported this tea had a right to.

In *Work vs. Louisiana*, 269 U. S., the Secretary of [13] the Interior was enjoined by the Courts of Louisiana, relative to the State's prosecution of a swampland claim under a State Act.

The Supreme Court also enjoined the Secretary of War in regard to the dismissal of a fleet of vessels, in disposing of a fleet of vessels in the Philippines. [14]

The Court: Let me ask you this about this case.

Mr. Andrews: Yes, your Honor.

The Court: The plaintiff here, as I read your complaint, received an order that he was to leave.

Mr. Andrews: Yes.

The Court: Nobody came and physically apprehended him to take him away?

Mr. Andrews: Not yet.

The Court: Well,—

Mr. Andrews: No, it hasn't been done.

The Court: Well, they don't threaten to do it either.

Mr. Andrews: Yes, sir; I think we set forth they threaten to do it. He was notified in writing. If we haven't it in the complaint—it has been some time since I drew the complaint. If I remember correctly, he was notified that he must leave by a certain time—or else.

The Court: All right. If he doesn't do that he thereby renders himself liable to a prosecution.

Mr. Andrews: Yes, your Honor.

The Court: For a misdemeanor.

Mr. Andrews: Yes, your Honor.

The Court: That is the only penalty, isn't it?

Mr. Andrews: No, there is a question there as to how far—Suppose the Military do take him out of the State. What are we going to do about it? The law says he must be prosecuted—— [15]

The Court: He can file a writ of habeas corpus. I mean, you couldn't file a writ now, could you?

Mr. Andrews: No.

The Court: Nobody has got him in custody.

Mr. Andrews: I couldn't file a writ.

The Court: Nobody is restraining him of his liberty.

Mr. Andrews: Not yet.

The Court: Has the Military authority said, "If you don't leave we are going to send a squadron of soldiers out and take you"?

Mr. Andrews: I don't think they say it in those words, but they have practically intimated that he is——

The Court: Well, what are the allegations in your complaint concerning this threat?

Mr. Andrews: Yes. I have it right here. About Page 10. Article XIII, on Page 10, Line 19: "The defendants have, since April 14, 1943, enforced and are enforcing said orders at the present time, and they have threatened, and they intend to carry out and enforce said orders and each of them; and will

unless restrained from so doing by order of this Court, carry out and execute each of said orders.”

Now, there is no denial of that.

The Court: Now, wait a minute. That is Page what?

Mr. Andrews: Page 10, Line 19, your Honor, Paragraph XIII.

The Court: Page 10. Now, in the order they direct [16] him to leave, but the only thing the order does which they say that they will execute is to have him appear for fingerprinting and photographing, isn't it? In other words, the point I have in mind,—

Mr. Andrews: I see.

The Court: —as you can readily see, is whether or not you are not previous in raising your questions here.

Mr. Andrews: Yes. Well, I think, your Honor, if there was a writ of habeas corpus, of course we couldn't do it. We couldn't say that we expect them to apprehend him. But I do find, if the Court pleases, in a great many cases that the Courts have permitted the issuing of a restraining order where the other side has taken a step which is absolutely—well, this step is enough to ruin a man itself. He is declared that he is unfit to remain in the State of California by this decision, he can't get work, he can't do anything, he is stopped from his daily occupation, which, under the decisions which I can quote to your Honor if you wish, is a violation of his rights as a citizen of the United States. He is prevented from earning his livelihood because here is

an order ordering him deported. He can't go any further.

Mr. Wirin: Would your Honor permit me to answer that question either now or later?

The Court: It would be pretty hard to restrain you.

Mr. Wirin: Well, you could. [17]

Mr. Andrews: Well, I would be very glad to have Mr. Wirin answer it right here, if he has a better explanation.

The Court: Well, let me see whether or not I have the point in mind. First of all, I don't think there is any doubt about the general proposition——

Mr. Andrews: Yes, your Honor.

The Court: ——The right to create courts to try persons without hearings, summarily or arbitrarily; but it seems to me as though there is a grave doubt about the time to raise this point. This is somewhat comparable to asking me, as a Court—I say “me”——I should say “the Court”——

Mr. Andrews: Yes.

The Court: (continuing) ——to issue a restraining order to direct some governmental agency how to make a decision; not what they shall do, but how they are going to decide a question. If it is permitted to the Military to determine whether a person is or is not dangerous to let within a certain area, they'd make that decision. Then, as I see the scheme set up under the law, within the Constitution, if a man doesn't obey an order which they give him after they have made the decision, he has a right to raise that question as to the validity of the

order, as to the validity of the Board, as to the validity of the law which establishes or attempts to create or establish that Board and that scheme. Then is when he is really hurt. In the meantime it is somebody making a decision concerning the [18] matter, and how can a Court step in and prevent some agency of the Government from making a decision one way or the other?

Mr. Andrews: Because, if the Court pleases, as I see it, the rights of this man have been taken away by the order itself. Let me read you from Page 11, your Honor, of the complaint on that.

The Court: Yes, I am familiar with it.

Mr. Andrews: Yes.

The Court: I remember. I read the allegations and I can see that. Isn't that somewhat comparable—and I have thought a great deal about this in my period of practicing law as a lawyer.

Mr. Andrews: Yes, your Honor.

The Court: Isn't it comparable somewhat to an accusation by a grand jury?

Mr. Andrews: Oh, it is far above that.

The Court: Well, I mean, let us follow it through now.

Mr. Andrews: Yes.

The Court: Somebody is charged by a grand jury with committing a crime. Suppose they are indicted by a Federal grand jury with bank robbery or conspiring to use the mails to defraud, or any one of the offenses which stand forever an accusation against him, regardless of what the ultimate outcome is. He may be acquitted, but between the time

of the accusation and the time of the trial isn't that a brand- [19] ing by the Federal Government that he is unfit?

Mr. Andrews: That is right.

The Court: But isn't that part of the necessary process of preserving this man's right to his trial ultimately?

Mr. Andrews: This man, if he is indicted by a grand jury, which is a form set forth in the Constitution, and they are following then the civil law, that entitled him to an immediate trial. When I say "immediate", I don't mean the day he is indicted. He can come before them and say, "This is all wrong". And that is what we are doing in this case. We are practically moving to quash the indictment, as your Honor would say. We say this order is an order that has been made where they had no right to do it. We move to quash this indictment, as it were. We are bringing this matter before your Honor for that reason, so that he won't be left for the rest of his life——

The Court: You could move to quash it because proper procedure had not been followed.

Mr. Andrews: Yes.

The Court: That is to say, procedures devised to protect the man's rights. But you couldn't move to quash it because the grand jury had decided that he ought to be prosecuted.

Mr. Andrews: No, you couldn't do it on the facts.

The Court: You couldn't do it on their conclusion.

Mr. Andrews: No, if they heard the facts and gave a hearing required by law; but after they have done that, as [20] this Military commission has, they have turned him out as ordered, and he stands indicted before the Court, then we have a right to a hearing.

The Court: Well,—

Mr. Andrews: They might say, "We have ordered you out of here, and we didn't make you go."

The Court: Well, Mr. Wirin has got ants in his pants, using the vernacular, of course. That probably wouldn't look so well when it gets before Professor Frankfurter.

Mr. Wirin: With all due respect to your Honor, the analogy of the indictment, with which Mr. Andrews is in partial accord, does not lie, for this reason. Here there has been more than branding; here there has been more than a holding up to possible obloquy of the defendant; here there has been both the indictment and the conviction and the sentence. Now, why? If your Honor will carry the analogy through, the summons which was served upon the plaintiff to appear before the Military, that was the indictment, and so far as I am concerned I will say to your Honor that probably at that time the defendant in that proceeding had no redress in the Courts; for a procedure having been set up the legality of which is questioned, you have to go through the procedure first before you go to the Courts.

[21]

But after the summons, namely, the indictment had been issued, there was something happened. It

is claimed what happened was not a true hearing and in defense the defendant appears, and then after that an additional step was taken, something else happened, there was a conviction, identical to what happened in court, and after that there was a sentence.

The Court: Was there any order?

Mr. Wirin: Oh, yes, the exclusion order.

The Court: Oh, yes. They said, "Get out", just the same as a Grand Jury says, "Go to trial. Go to jail."

Mr. Wirin: Well, no, the Grand Jury doesn't say "Go to trial." The Grand Jury says, "Something is represented to us to be a matter to be determined." And the Court says, "You go to jail." And when the Court says, "You go to jail," there has been a penalty, so far as judicial procedure is concerned, a sufficient penalty for review by a higher court.

In this case there was the hearing and there was the finding, if you will, by the military tribunal, the jurisdiction of which is challenged. There was more than that. There was exclusion of some kind; there was a sentence imposed and exclusion was ordered, and it says, "You are found guilty. You are now ordered to depart within a certain time."

Let's move just a step further. The order was made by [22] the Lieutenant General, the one man who has the final authority to make the order. There could be no appeal or no representation to the military set-up from this order.

Let's go to another point which I think is equally correct. What is the evil in your Honor's thinking that the only thing that can happen to this plaintiff is that he may be prosecuted for a violation of public law? Now, he may be prosecuted and something else may happen to him, similar to what happened to thousands of persons of Japanese descent, he may be removed physically, may be taken out. There is no particular provision for the defendant being kept anywhere.

The Court: I don't read the order that way.

Mr. Wirin: Now, if you will just also keep this in mind: you may have to read the order that way, for this reason. If General DeWitt's authority is claimed by virtue of the Executive Order, a copy of which Mr. Silverstein has, it provides, if your Honor will read the last paragraph on the first Page:

"I hereby further authorize and direct the Secretary of War and the said military commanders"—that would be General DeWitt—"to take such other steps as he or the other appropriate military commander may deem advisable to enforce compliance with the restrictions applicable to each military area hereinabove authorized to be designated, including the use of Federal troops and other Federal [23] agencies, with authority to accept assistance of state and local agencies."

This Executive Order confers express authority upon the defendant, General DeWitt, to enforce his orders with such forces, including military forces, as

he may deem advisable or appropriate, so they sustain the Executive Order, which is the regular Act of Congress. But that wouldn't make any difference. This order is dated February 19, and the Act of Congress is dated March 5, the Executive Order. I say it is claimed that the authority that General DeWitt has authority to make this particular Order solely by virtue of this Executive Order, this exact Order, confers that kind of physical power on him.

The Court: Order Federal troops, or turn him over to the marshal and let him put him in jail.

Mr. Wirin: I think the military commander has that choice.

The Court: Isn't that when he is hurt? Isn't that actually when he is restrained of his liberty?

Mr. Wirin: Well, now, that is when he is actually restrained of his liberty. But as I understand, the injunction process is available to a person, not when his liberty is actually or already has been restrained, but that is when a writ of habeas corpus is available to him.

The Court: Yes.

Mr. Wirin: But just before that there may be a reasonable [24] likelihood of his being restrained of his liberty and that is why injunction is available at times before habeas corpus is available.

Now, you have here a verified complaint, a complaint which does not recite that the General has told the plaintiff that on a certain day he will take him into physical custody but a complaint which nonetheless does recite an authority upon defend-

ants to enforce this order, whether you have the general authority conferred upon the military commander by the Executive Order to use that physical force and military force, if you will, or not. You have no denial or intimation of denial by the defendants. They come to court and challenge the statement made in a complaint, where, on the statement as it appears, as it might be, there might arise a question of doubt, but there isn't any question in the Wilcox case that the military would not by force physically exclude the plaintiff in that case.

The Court: That was included in the Order though. They were warned, they were told they were going to be gathered up by the Army and held to be put in camps.

Mr. Wirin: In the first instance, your Honor.

The Court: In the first instance they said, "Get out; get out of this territory; all persons of Japanese ancestry get out of this territory. All persons who remain in this area will be gathered up on such and such a date." Isn't that right? [25]

Mr. Wirin: That is true.

The Court: So the step that is now taken is comparable to the first step there in this case, that is, "Get out." Under this case, as I see it, you can't tie up the civil processes which will then be invoked upon him.

Mr. Wirin: Oh, I see.

The Court: I cannot presume, I don't think, that the military authorities are going to forcibly gather up this man and take him out of the jurisdiction of this court, or out of the military, designated mili-

tary area, without any warning, or any further warning, can I?

Mr. Wirin: I think, your Honor cannot presume so, but I think where there is an allegation in the complaint that an order has been made and the defendants are threatening to enforce the order, in the absence of any denial——

The Court: They threaten to enforce the order, but I have a right to think that they will enforce the order according to the law.

Mr. Wirin: According to which law?

The Court: According to the——

Mr. Wirin: According to which law? Executive Order 9066? That is the law that says the military commander may enforce the order by military forces; public law 503 says the order may be additionally enforced by criminal prosecution; this complaint says nothing about a criminal prosecution; this complaint does not enjoin the United States Attor- [26] ney.

The Court: You don't know whether he will be criminally prosecuted, or not.

Mr. Wirin: No. And we are not challenging that possibility. We are challenging the other possibility which they allege in the complaint, under oath, which is alleged by the plaintiff, is not a possibility but is an imminent probability.

Mr. Silverstein: May I interrupt just one minute?

The Court: Go ahead and take your time. I think this is your turn.

Mr. Andrews: I would like to say one more word. I have still one more argument.

The Court: Just one more argument? Let's hear it.

Mr. Andrews: All right. My argument is this, if the Court please: that as far as that military order is concerned, as Mr. Wirin says, that is a definite thing. But I still like your Honor's analogy of the indictment. You cannot go to the Grand Jury and say, "You people made a mistake, and you are entitled immediately to your freedom under the law". Our remedy here is to have a declaration of the court that this man exceeded his authority, this military General exceeded his authority under the Constitution of the United States, and we say he cannot do anything further, he cannot report this man to the district attorney, he cannot escort him with the military forces out of this district, because it [27] is void, and we ask for an injunction on the Order that is set forth in the complaint. I think I have given your Honor the decisions on it. I have them here.

The Court: Yes, I have them.

Mr. Andrews: I won't repeat. That is my attitude, your Honor, in this case. We don't know. We are not in a position to know, if the Court pleases, what else they will do. They have conceded so far that this man has a right to a trial and he says, "These people have put a stain on my name; they have made a threat I am going to be prosecuted; I have been deprived of the liberties I am allowed by the Constitution, by this Act."

And the Court says to General DeWitt—we hope—
“No, you cannot do that. That matter is illegal.
You cannot interfere with the Constitution like
that. You have interfered with him up to now.
You have no final appeal to the district attorney.”
That is my opinion.

Mr. Silverstein: Your Honor, please, may I file
at this time Proclamations Nos. 1 and 2, that coun-
sel are familiar with?

The Court: Yes.

Mr. Silverstein: And the letter of February 20,
1942, an excerpt, from the Secretary of War to
General DeWitt, and the letter of June 15, 1942?

The Court: All right.

Mr. Silverstein: You are familiar with these
and I would like to introduce them. I am sure they
will shed some light. [28]

The Clerk: Are these offered as exhibits?

Mr. Silverstein: Exhibits 1, 2, 3 and 4.

The Court: Very well.

(The documents referred to were marked as
Defendants' Exhibits No. 1, 2, 3 and 4 and
were received in evidence.)

Mr. Andrews: We want to call your Honor's
attention to the fact there is nothing, no plea has
been made on their authority whatever, but they
have been called to our attention in this case.

Mr. Silverstein: You are familiar with them?

Mr. Andrews: Mr. Wirin is probably familiar
with them. I don't care whether we are familiar
with them or not. You have not the right to set

aside the Constitution or the law, or the Act of Congress, by any letters.

Mr. Wirin: All these matters deal with the Act of Congress which we say is not in issue at all at this time. We are not challenging the Act of Congress; we are not alleging any threatened prosecution under that Act. All these matters pertain to the circumstances surrounding all this.

Mr. Silverstein: You question the authority of General DeWitt and this letter of authority, under 9066. That is what his authority is.

The Court: You are offering these on the basis the Court can take judicial knowledge?

Mr. Silverstein: Yes, and as a part of my argument on the record, we have a right to offer such matters. [29]

The Court: Only those matters of which I can take judicial notice.

Mr. Silverstein: Yes, that is true.

The Court: If you want to offer them as a matter of argument, you can offer anything.

Mr. Silverstein: Is there any objection to them? We offered the same matter in the other cases.

The Court: I will take judicial knowledge of them.

Mr. Wirin: You could take judicial knowledge of them.

The Court: Yes, I will take judicial notice of them.

Mr. Silverstein: Now, if your Honor please, I think the question that is before the Court has been expressed by your Honor.

The Court: By the way, let's dispose of your motion to strike first, shall we?

Mr. Silverstein: Yes.

The Court: You have a motion to strike here, so we will see what is left of the complaint.

Mr. Silverstein: Our motion goes to the damage feature and I have authorities here——

The Court: You have stricken the second cause of action?

Mr. Silverstein: But there are certain allegations of damage in Count 1.

The Court: I couldn't find your item "B-1." You say, "to strike from Line 23 of Paragraph II, on Page 2, beginning with the word 'plaintiff' to the word 'profession' on Page 4." [30] I see.

Mr. Silverstein: Yes.

The Court: Page 4 of what?

Mr. Silverstein: Of the complaint.

The Court: This is Line 20. I see where it is now. That will be denied. That is Item "B-1", Mr. Clerk. That is denied.

Paragraph 4 of Page 6?

Mr. Silverstein: No.

Mr. Wirin: May I address the Court for one moment, as to the theory or reason why matters apparently——

The Court: When I get to it. No. 2 is denied. 3 is denied. 4 is granted partially. Beginning with the words "that the order of exclusion" in Line 17, to the end of the paragraph, is granted. Do you find it?

Mr. Silverstein: Yes, your Honor. State that again.

The Court: That is Page 8, Paragraph 9, beginning with the words on Line 17, "that the order of exclusion referred to as Exhibit F"—that is granted. That is stricken to the end of the paragraph.

No. 5 is denied.

Mr. Wirin: May I have a word as to that, your Honor?

The Court: 5?

Mr. Wirin: Yes.

The Court: I have denied his motion to strike it.

Mr. Wirin: As to 6? [31]

The Court: 6 is denied. All right. Do you want to be heard on that?

Mr. Wirin: Yes. My understanding of the state of the law with respect to the authority of Federal authorities to issue release is this: that there must be in controversy an amount involving \$3000 or more. While there is no challenge on the matter at least, your Honor, at this time, I think there should remain in the pleading the allegation as to damage, an allegation as to the amount involved to disclose that it is in excess of \$3000, else the Court would not have any jurisdiction to entertain the proceeding at all. If only for that premise, not for the purpose of supporting a judgment or claim for damages, that this matter, I think, is properly in here.

The Court: What have you to say to that?

Mr. Silverstein: As to the damage, your Honor?

The Court: He says in the first cause of action, that is the one for injunction, that it is necessary to establish jurisdiction that an allegation be made as to the value of the rights which are threatened to be injured, and this allegation is an allegation that the value of his rights exceed \$3000. I don't think so. I think it is an enforcement of the Federal law. I don't know where else you would go but to the Federal court.

Mr. Wirin: We have had a lot of difficulty about that. There are cases—— [32]

The Court: I know, pro and con.

Mr. Andrews: It might be unnecessary, but if the Court please, it is an allegation of jurisdiction and as such we respectfully submit it should not be stricken.

Mr. Silverstein: I feel the damage element should be entirely stricken out. I think the authorities show it, and there is no reason because you have set it up, as you have in the pleading, that it should be there because the law is one way; there are agents of the government and acting in due course, under authority, and the matter of damages has no place there.

The Court: It is stricken, all of the claims for damage. This is similar, as I recall it, to a New Hampshire case where they tested some ordinance requiring a license for a man to do business, and the court held he had to allege that his right to do business was worth more than \$3000 before the complaint stated the cause of action. And, as I

remember the case—I haven't read it now in a long time—they held it didn't state a cause of action because he did not have an allegation that his right to do whatever it was—I think it was to deliver milk—exceeded \$3000.

Mr. Silverstein: Then the section on the damage feature is stricken?

The Court: It is stricken. And you have amended your [33] complaint to eliminate any prayer for damages?

Mr. Wirin: Yes, your Honor.

The Court: 7 will be denied then. By the same token 8 will be denied. 9 and 10 are granted upon the motion of the,—

Mr. Andrews: They are not at issue now. Your Honor, they are dismissed.

The Court: Now, upon the prayer, Paragraph 4 will be stricken.

Mr. Andrews: Yes, your Honor; no objection to that.

The Court: All right. Paragraph 4 of the prayer is stricken on motion of the plaintiff. All right. The Complaint remains substantially as it was.

Mr. Silverstein: May I have time for consideration of one of the facts after I finish my argument?

The Court: Yes.

Mr. Silverstein: May I proceed then with the argument?

The Court: Yes.

Mr. Silverstein: If your Honor please, I have offered as an exhibit before your Honor this Order

9066. Your Honor takes judicial notice of those exhibits. Now, 9066 was backed up by Public Law 503, which is the criminal statute to which I have called your Honor's attention, and to 1897-A. Of course it is an element, so I don't want your Honor to feel that it is, as such, a prosecution of 503 or 1897-A. There is a limit and I don't want your Honor—— [34]

The Court: There is a limit?

Mr. Silverstein: I mean the powers of the military commander would not be limited to the prosecution under Public Law 503 known as 1897-A.

The Court: Yes.

Mr. Silverstein: Using that, your Honor, the argument which will be made before your Honor will be that they have failed to state a cause of action here, for the reason that, primarily, the court has no authority to interfere with the discretionary power, so-called, of the military commander. In this instance the authority to the military commander being brought about from the Secretary of War, and to the Secretary of War from the Commander in Chief, the President of the United States, under war powers which have been granted to the President. Now, throughout——

The Court: Just a moment. Let me understand. If I comprehend your position correctly then, your position is that as a consequence of the fact that this Order is not necessarily a criminal prosecution, it may be that General DeWitt or the Commanding General will send a bulletin down and take hold of him and carry him out of the district?

Mr. Silverstein: I say that it is not limited to the criminal prosecution, in all fairness, yes.

The Court: Under the present Order your position is that the Commanding General has that power?

Mr. Silverstein: Yes. That is, certainly I don't want [35] to state to the Court that it is limited to a criminal prosecution, but the Order refers to the authority of the Commanding General here and says he cannot be prosecuted for the violation of Public Law 503. But don't get away from this, that in this record he is not charged with a criminal matter. I say he has been given a hearing, as provided; that he has been held. And my thought to you is this: under the law, and I will cite the authorities that I believe uphold my argument in this record, when an officer or agent, in this instance, or any others of the Western Defense Command—General DeWitt—was given authority to act as he did, that the Court should not say, "No, General DeWitt, you acted wrongfully. You did not use the proper discretion, but I, sitting as a judge, would have acted differently."

The Court: They are not claiming that.

Mr. Silverstein: Oh, yes.

The Court: They didn't have a hearing.

Mr. Silverstein: Oh, yes, they are. They have no right to be here under any circumstances, unless they can show this is the proper tribunal in which to proceed.

The Court: They have alleged that.

Mr. Silverstein: They have alleged it, if your Honor please.

The Court: That must stand as a fact because it is undenied. [36]

Mr. Silverstein: But, if your Honor please, it goes further than that because the factual matters and the law that goes with the factual matters, takes it out of that sphere entirely. That is what I am trying to impress upon the Court.

The Court: All right. Go ahead.

Mr. Silverstein: That is the only way they can come into this Court under any circumstances. And then I say it would not apply because we have a war situation here. The same state of facts that would have existed before the declaration of war would be interpreted entirely differently, and should be interpreted entirely different by the Court than the state of facts that existed when there is a declaration of and war conditions. I hope I have made myself clear, that if this set of facts existed without war, then there would be an entirely different situation. But we have a war power, and we have the authority of the Secretary of War, and the Commander-in-Chief, the President. Your Honor cannot assume at all, and, in fact, if you did assume it would have to be in favor of General DeWitt.

There is not anything before your Honor that shows that he knew this man Alexander at all. Therefore, certainly your Honor cannot assume that he has taken an arbitrary attitude towards this man. Your Honor cannot assume that capricious-

ness has shown itself, because then your Honor would have to take the reverse to any Chief or Commander of the Western District here of the Armed Forces who is acting [37] for the one hundred and thirty-six some million people. And while Mr. Alexander is an individual under the law, even though he has been hurt perhaps to some extent, he must give in to the good of the others concerned.

The Court: I think, counsel, and I don't say this with any definiteness, but it strikes me that the scheme set up by Congress that the Commander has the power to have a hearing and decide, and then if a man does not obey, he is subject to prosecution, is within the Constitution. I am not at all impressed with the proposition that the Commanding General can have a hearing, such as is described in his verified petition, and then, if a man does not obey the Order, can take him up and take him out of the district.

Mr. Silverstein: I am not saying what the Commander is going to do.

The Court: Of course, they want him restrained somewhat now.

Mr. Silverstein: All right.

The Court: You have said that you don't wish to bind the Commander, but he has the power if he desires.

Mr. Silverstein: I haven't any right to bind the Commander or the General at all.

The Court: All right.

Mr. Silverstein: I am speaking as a matter of law. [38]

The Court: I understand. Your position is as the Order stands the Commanding General can come into this court room and take a squad of soldiers and take this man and move him right out. That is your position.

Mr. Silverstein: Under the authority of the Order. It says he will be liable to prosecution by Public Law 503.

The Court: But if he is only subject to prosecution by Public Law 503, then he is entitled to remain here at his peril, at his peril of being prosecuted, the same as any man who refuses and refuses, at his peril of being prosecuted.

Mr. Silverstein: One part of the Order is "Failure to comply with the foregoing will subject you to criminal penalties under Public Law 503, approved March 21, 1942, with respect to persons who enter, remain, and leave, or commit any act in any military area or zone."

That is all before the Court at this time.

The Court: All right. If that is all that is before me——

Mr. Silverstein: That is all that is before the Court, but there is another matter and I say that so far as the authority that is given under Executive Order 9066, a military commander may have that other authority that is not before your Honor at all at this time.

The Court: Then why discuss it?

Mr. Silverstein: They brought the matter up and I didn't want to state something to the Court

which I didn't feel was [39] fair to state to the Court. That is all.

The Court: As I stated during the course of plaintiff counsel's argument, it seemed to me there was no effort made that he should be physically removed from this district.

Mr. Silverstein: There isn't anything that has been done here.

The Court: And the authority is if he doesn't obey the Order he will be subject to the penalties of the laws enacted by Congress. I don't know, but I think, counsel, that there is no use in discussing further whether or not General DeWitt has the power to physically take the man.

Mr. Silverstein: That is right. That raises another issue.

The Court: That is not before me. If it is before me, I will issue an order restraining him. If that is now before the Court, I will issue an order restraining the Commander General from physically removing this man from this district, but it does not seem to me that it is before me.

Mr. Silverstein: It is not before you and I don't want to be bound by anything that is not before the Court whatsoever. You admit that the man is here, do you not?

Mr. Wirin: We will keep him here.

Mr. Silverstein: I didn't ask you that. I asked you if you would admit that the man is here.

Mr. Andrews: He is here.

The Court: That being the case I don't think there is [40] anything else before the Court. It

seems to me that the only thing is that the law will be obeyed. I don't think they are entitled to a preliminary injunction on this Order.

Mr. Wirin: May I address the Court and address a question to Mr. Silverstein through the Court?

The Court: Yes.

Mr. Wirin: Is Mr. Silverstein's position in court, and for the record, as counsel for the defendants, that there is no intention on the part of any of the defendants physically to remove him?

The Court: His position is they have a right to that, but his position further is, as I understand it, that it is not now threatened.

Mr. Wirin: Is that his position?

The Court: Is that your position?

Mr. Silverstein: My position is this, your Honor, that they have that authority if they care to exercise it.

The Court: Is it your position under this Order that it is threatened?

Mr. Andrews: That has been.

Mr. Silverstein: Your Honor, I don't know how far you feel I should go.

The Court: Well, I want to know what your legal position is.

Mr. Silverstein: I have stated it.

Mr. Wirin: And we want to know. [41]

The Court: They say you have alleged the authority to use physical force.

Mr. Wirin: By virtue of the authority conferred upon the Commander by the Executive Order.

The Court: Is it your position and do you concede that the Commanding General has threatened to remove him by physical force?

Mr. Silverstein: He has issued the orders that appear here.

Mr. Wirin: All we want is some protection against that.

Mr. Silverstein: I know they do. I would like to argue this matter a little further. I think I can overcome any of these matters here that counsel have urged.

The Court: I am trying to decide it in your favor.

Mr. Silverstein: I know that you are, but, your Honor, at the same time you are endeavoring to place me in a position here where you want me to state something that I don't feel is before the Court.

The Court: It certainly, most assuredly, is before the Court, and that is whether or not there is a threat to physically remove this man by the Commanding General.

The Court: No, you say he has that power. Now, is it your legal position that this Order is a threat of physically removing him? That is what [42] I want to know. If it is before the Court I will issue a restraining order restraining the Commanding General.

Mr. Silverstein: Without any further hearing or argument on the authority?

The Court: Let's first decide whether or not it is your position. If it is not your position, then there is no use in your arguing.

Mr. Silverstein: I don't know why your Honor should—may I say this—put me in that position, when the Order is before the Court, and it is an exhibit here. Your Honor can grant this. But as to what it constitutes or what it does not constitute, I think that is a matter for the Court to determine.

Mr. Andrews: Your Honor, we say despite any limitation of the Order, we are under this Executive Order, and we say now that no matter what was said about doing this to our man, the District Attorney says, "He can do it, if he wants to."

Mr. Wirin: We say it under oath, and it is undenied.

The Court: You say it according to this. This is your authority. It doesn't seem to me I can read anything into this Order that is not here.

Mr. Wirin: No.

The Court: Apparently, the District Attorney feels he is restricted in his authority to make any decision.

Mr. Silverstein: I am only restricted, your Honor, as [43] a matter of law. From what appears before the Court, I claim they have no right to a temporary injunction. I am here to resist that, and am here to have stricken everything so far as damages are concerned. Your Honor has ruled to some extent on the motions. Now I say that they are not entitled to an injunction under any circumstances, and I think the law is all one way on it. As to the temporary injunction, I don't think there is any law that they can produce. [44]

I say that the only way they can come here under

any circumstances is under the Fifth Amendment. With reference to the Fourteenth, that applies to the States and the equal-protection clause isn't there. I say that where the personal liberty is concerned, let them show one case where an injunction has ever been granted under that Fifth Amendment of a similar nature or anything pertaining to it. I say that the law that I have and I can cite to your Honor is all one way in that regard, in my favor.

Now, the issue has come up here as to whether the Military—Whatever I would state your Honor knows I would definitely abide by.

The Court: I know that.

Mr. Silverstein: And that is the reason I am very careful what I am agreeing to. I have no authority over the Military, as your Honor knows. I am appearing here for General DeWitt, acting as counsel because he is sued in here as one of the defendants, and for Mr. Hood, of the F. B. I., who is head of the F. B. I., as your Honor knows. Now, it is my opinion, your Honor, at least from what appears here, as to what should take place later, it would be something to come before the Court.

The Court: Is it your opinion that this order here is a threat to remove him physically?

Mr. Silverstein: It prohibits him from being here.

Mr. Wirin: It tells him to get out and stay out.

[45]

Mr. Silverstein: It tells him to depart, and then it says "Failure to comply will subject you to the criminal penalties."

The Court: It looks to me like that is all he has threatened to do. I don't think he has threatened to do any more, counsel.

Mr. Silverstein: I don't care to go any further.

The Court: ——"and subject you to the criminal penalties".

I don't want to cut you short on your argument, but I mean there is no use in either you discussing the matter or my considering it if there is no threat to use physical force. That is all that the Military Commander has spoken.

Mr. Wirin: May we have there just a word about that, your Honor?

The Court: Another one?

Mr. Wirin: Two or three words.

The Court: All right.

Mr. Wirin: We don't think that you should limit yourself in determining what may happen to this plaintiff merely in terms of the order itself.

The Court: Oh, I can't decide a controversy that is not before me. I mean howsoever much I would like to speculate on the rights and privileges of people, I can only decide this litigation, and the only question that is litigated here is what the Commanding General has threatened to do. [46]

Mr. Wirin: Now, the plaintiff, as I said, in his verified complaint, says there is a threat to enforce this order by a physical ouster. Now there is no assurance or even statement to this Court by counsel for the defendants that the action to be taken by the Military Commander is to be limited to a prosecution under 503.

The Court: Well, I can understand that. The United States Attorney acts as attorney for the Departments, he does not act as their director, and having occupied his position I know that he is limited in making any commitments concerning what is in the mind of some other department to do. But now the only demonstration of what they intend to do is "failure to comply" will subject him to the criminal penalties of that law. Then he will have his day in Court. Then he will have his opportunity to test the validity of the Executive Order, of the Act of Congress, of the Proclamations No. 1 and 2, the letter of Stimson, and so forth. It seems to me that that is the time. I don't know—I certainly can sympathize not only with this plaintiff but with every other person who is charged with crime, before they are convicted. I mean, surely it is not any different than making a report. The governmental agencies that prosecute for offenses follow the policy of keeping them confidential, but there is not any law particularly that requires them. I mean suppose the F. B. I. made a special report on the Post Office Department and somebody would be hurt just as [47] much.

Mr. Wirin: May I just inquire, is it your Honor's interpretation or construction of the pleadings before the Court and the statements made by counsel for the defendants that there is no threat of or immediate danger of any physical removal of the plaintiff from this area?

The Court: That is the way it appears to me now.

Mr. Wirin: That is the only relief we are asking. Now, if there were that assurance, by the judicial requirements of the state of the pleadings and statements of counsel, then we agree with the Court there is no warrant for issuing any injunctive relief.

The Court: I don't think your complaint states a cause of action for that reason. I don't think there is anything here. If there was a threat that he was going to physically remove this plaintiff from this jurisdiction or from his home or from a Military area, then I think you would have something that would now be before the Court, but all he is threatening to do is to enforce the law, the Act of Congress; that "if you don't do this", why, then it is up to some other department of the Government.

Mr. Wirin: But there is the allegation in the complaint, after a recital of the order and its terms, that the defendants threaten to enforce the order.

The Court: Well, I think there has to be more than that, Mr. Wirin, I mean just a mere conclusion that they [48] threaten to enforce the order. The manner of enforcement is indicated.

Mr. Wirin: But it is not an exclusive manner.

The Court: If you had alleged that he had seen General DeWitt or Captain So-and-so, or Major This, or somebody else, and they had told him, "We are going to physically remove you from the district", then there might be something further; but here is a mere allegation of threat.

So I think that the motion to grant the injunction pendente lite will be denied. As a matter of fact,

I think that I am compelled under my view to grant the motion to dismiss until there is some physical threat shown, and the motion to dismiss will be granted.

I suppose there will be a judgment for dismissal prepared on this. I imagine that the plaintiffs will probably want to take proceedings for appeal as expeditiously as possible.

Mr. Andrews: Well, your Honor, if your Honor's interpretation of that law is the same, that is all we want. We want the man to stay here until there is a proper order.

The Court: Well, I don't know. It isn't before me. It may come before some other Judge. The District Attorney says he hasn't had a chance to argue it, and maybe if he does have a chance to argue it and there is a physical threat he might be able to change my mind.

Mr. Andrews: He won't be able to change ours, with [49] all due respect. But, if the Court pleases, I haven't consulted with other counsel, but I doubt very much if we will go any further on this line, because your Honor's interpretation of the matter is exactly what we hoped is the law.

The Court: The only point I have in mind is I was going to suggest that there should be a prompt preparation of a judgment,—

Mr. Andrews: Yes, your Honor.

The Court: —so that if you desire to appeal and prosecute the matter further, you can.

Mr. Andrews: May we present the—

The Court: These matters are continually arising, they are exceedingly important not only to the safety of the country but to the welfare and the rights of citizens, so it might be well—I would like to see something get up to the higher Courts as quickly as possible.

Mr. Andrews: Well, if it is your Honor's suggestion and it is agreeable to the District Attorney, we will prepare an order and submit it to the District Attorney and your Honor.

The Court: Very well. You were about to say something, Mr. Silverstein?

Mr. Silverstein: No, I think I won't say anything more.

The Court: All right. I think these belong to the District Attorney. [50]

Mr. Silverstein: No, I was going to leave this with the Court, I mean if you want it.

The Court: You had better take it. I will get it again.

[Endorsed]: Filed Oct. 18, 1943. [51]

[Endorsed]: No. 10514. United States Circuit Court of Appeals for the Ninth Circuit. Kenneth Alexander, Appellant, vs. Lt. General John L. DeWitt, Commanding General of the United States Army of the Western Defense Command and Fourth Army, and R. B. Hood, Special Agent in Charge of the Federal Bureau of Investigation of the United States Department of Justice located at Los Angeles, Appellees. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed October 23, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

No. 10514

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

KENNETH ALEXANDER,

Plaintiff and Appellant,

vs.

LT. GEN. JOHN L. DEWITT and R. B.
HOOD, Special Agent in Charge of Fed-
eral Bureau of Investigation, United
States Department of Justice, at Los
Angeles, California,

Defendants and Appellees.

APPELLANT'S OPENING BRIEF.

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FILED

OCT 4 - 1943

The Myers Legal Press, Los Angeles, Phone MUtual 4961

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CLERK

TOPICAL INDEX.

	PAGE
Statement of jurisdictional pleadings and facts.....	1
Statement of case.....	4
Brief statement of questions involved in the appeal.....	13
Argument	14
Point I. That the court erred in dismissing the complaint of the plaintiff-appellant wherein he prayed for an injunction and damages against the defendants-appellees herein.....	14
Injunction is the appropriate remedy to challenge illegal action by officials of a federal executive department.....	25
The courts have the duty and authority to and they will adjudicate the validity of military orders.....	25
The minimum requirements of due process contemplate at least a fair hearing.....	25
Point II. That the military tribunal which took upon itself to try and convict plaintiff-appellant, and which ordered him out of the Western Defense Command was not competent so to do especially, in view of the fact that by the terms of its own documents it excluded the plaintiff-appellant from the protection of all of the rights given to every American citizen by the Amendments to the United States Constitution commonly known as the "Bill of Rights".....	27
The rudimentary demands of justice incorporated within the concept of due process of law, make a fair and full hearing mandatory	32
The existence of war does not suspend the Constitution, nor abrogate the Bill of Rights.....	32
Point III. Plaintiff-appellant's motion for injunction pendente lite, together with his other pleadings in the case, not being contradicted as to facts, should have entitled, and does entitle, plaintiff-appellant to a temporary injunction restraining defendants from enforcing the order of the military tribunal pending the trial of this suit.....	39

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Allgeyer v. Louisiana, 165 U. S. 578.....	26
Casserly v. Wheeler, 282 Fed. 389.....	33
Edwards v. California, 314 U. S. 160.....	26
Goltra v. Weeks, 271 U. S. 536.....	24
Hamilton v. Kentucky Distilleries, 251 U. S. 146.....	34
Hansberry v. Lee, 311 U. S. 32.....	26
Herndon v. Lowry, 301 U. S. 242.....	36
Holden v. Hardy, 169 U. S. 366.....	26
Home Building and Loan Association v. Blaisdell, 290 U. S. 398	34
Houston v. Ormes, 252 U. S. 469.....	24
Hurtado v. California, 110 U. S. 516.....	25
Lane v. Watts, 234 U. S. 525.....	24, 39
Lipke v. Lederer, 259 U. S. 557.....	24
Meyer v. Nebraska, 262 U. S. 390.....	26
Milligan, Ex parte, 4 Wall. 2.....	25, 31, 32, 33, 35, 36, 40
Mitchell v. Harmony, 13 How. 115.....	32
Morgan v. United States, 304 U. S. 1.....	26
Ohio Bell Telephone Company v. Public Utilities Commission, 301 U. S. 292.....	26
Olga Schueller v. H. A. Drum,, Lieut.-Gen., U. S. Army, No. 3151	42, 53
Orozco, Ex parte, 201 Fed. 106.....	25, 40
Palko v. Connecticut, 302 U. S. 319.....	26
Perkins v. Elg, 307 U. S. 325.....	24, 40
Powell v. Alabama, 287 U. S. 45.....	26
Quirin, Ex parte, 87 L. Ed. (Adv. Op.) 1.....	25, 32, 40
Railroad Commission of California v. Pacific Gas & Electric Co., 302 U. S. 388.....	26
Snyder v. Mass., 291 U. S. 97.....	26

	PAGE
Sterling v. Constantin, 287 U. S. 378.....	25, 31, 32, 34, 35, 37, 40, 53
Thornhill v. Alabama, 310 U. S. 88.....	34
Truax v. Corrigan, 257 U. S. 312.....	25, 32
United States v. Bernstein, 267 Fed. 295.....	33
United States v. Cohen Grocery Co., 255 U. S. 81.....	33
United States v. Nourse, 9 Pet. (U. S.) 8.....	24
United States v. Viereck, U. S. Supreme Ct., Mar. 1, 1943, 87 L. Ed. (Adv. Op.) 529.....	32
United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U. S. 103.....	25
Waite v. Macy, 246 U. S. 606.....	25, 39
Work v. Louisiana, 269 U. S. 250.....	25, 39

STATUTE.

United States Constitution, Art. III, Sec. 1.....	25, 40
---	--------

TEXTBOOK.

55 Harvard Law Review, p. 1272, Law of Martial Rule, Charles Fairman	52
---	----

INDEX TO APPENDIX.

PAGE

Exhibit "A-1." Executive Order No. 9066, dated February 19, 1942, 7 F. R. 1407, Authorizing the Secretary of War to Prescribe Military Areas.....	1
Exhibit "A-2." Extract of Letter From Hon. Henry L. Stimson, Secretary of War, to Commanding General DeWitt, Western Defense Command and Fourth Army, Presidio, San Francisco, California, Dated February 20, 1942.....	3
Exhibit "A-3." Public Proclamation No. 1, F. R. 2320, War Department, Headquarters Western Defense Command and Fourth Army, Presidio, San Francisco, California. Military Areas Nos. 1 and 2 Designated and Established March 2, 1942	4
Exhibit "A-4." Public Proclamation No. 2, 7 F. R. 2405, War Department, Headquarters Western Defense Command and Fourth Army, Presidio, San Francisco, California. Establishment of Military Areas 3, 4, 5 and 6, March 16, 1942.....	8
Exhibit "A-5." Order Signed by Secretary of War Henry L. Stimson to General DeWitt, Dated July 15, 1942.....	12

No. 10514

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

KENNETH ALEXANDER,

Plaintiff and Appellant,

vs.

LT. GEN. JOHN L. DEWITT and R. B.
HOOD, Special Agent in Charge of Federal Bureau of Investigation, United States Department of Justice, at Los Angeles, California,

Defendants and Appellees.

APPELLANT'S OPENING BRIEF.

Statement of Jurisdictional Pleadings and Facts.

On or about the 27th day of February, 1943, appellant received a letter on the letterhead of Headquarters Western Defense Command and Fourth Army, Individual Exclusion Board, Presidio of San Francisco, California, signed by Randell Larson, Lt. Col. F. A., Recorder, notifying the said appellant that a Board of Officers would convene on Thursday, the 11th day of March, 1943, at the hour 1:30 P. M. at 458 South Spring Street, Los Angeles, California, for the purpose of considering whether military necessity required that this appellant be ordered excluded from certain military areas of the Western De-

fense Command, a copy of which notification, marked "Exhibit E", is attached to plaintiff's complaint and found at pages 23-25 of Transcript of Record. Attached to said notification there were no charges against the plaintiff, and the notification stated that while he might be accompanied by counsel, the counsel would not be heard by the Board nor would be permitted to examine witnesses.

The notification further proceeded to violate every regulation of the Amendments to the Constitution of the United States as to the plaintiff being given a chance to protect himself by due process of law, nor was there any intimation therein that the proceeding would be conducted so that the defendant would be advised as to the charges against him, know who his accusers were and have the right to face them, hear their testimony or have the right, by attorney or in person, to cross-examine them. The notice further stated that the plaintiff was not charged by the notification in question with any penal offense.

Thereafter appellant was informed that the so-called Individual Exclusion Board would meet in the Biltmore Hotel in the City of Los Angeles;

Thereafter, on the 14th day of April, 1943, the appellant received a communication entitled "Individual Exclusion Order" signed by John L. DeWitt, Lieutenant General, U. S. Army Commanding, excluding him from entering into Military Areas Nos. 1 and 2, comprising the states of Arizona, California, Oregon and Washington, in accordance with Public Proclamation Nos. 1 and 2, dated March 2, 1942, and March 16, 1942, respectively, and notifying him that the present action was dictated by military necessity, and that within forty-eight hours after service upon him of this order he was required to take his de-

parture from said premises, a copy of which order, marked "Exhibit F", is attached to plaintiff's complaint and found at pages 26-28 of Transcript of Record.

Thereafter, plaintiff-appellant on or about May 7, 1943, filed a Complaint for Preliminary Injunction and for Damages in the United States District Court, in and for the Southern District of California, Central Division, against Lt. Gen John L. DeWitt and other defendants named in said action, a copy of which complaint is set forth at pages 2-28 inclusive of Transcript of Record.

Thereafter, on May 11, 1943, plaintiff-appellant filed a Notice of Motion for Injunction *Pendente Lite* against all persons who had been named in the Complaint hereinabove referred to, seeking an Order enjoining said defendants, and each of them, *pendente lite*, from executing, or causing to be executed, those certain orders denominated in plaintiff-appellant's Complaint as Exclusion Order dated April 14, 1943, a copy of which Notice of Motion is set forth at page 29 of Transcript of Record.

Thereafter, and on May 24, 1943, the United States Attorney, on behalf of Lt. Gen. John L. DeWitt and R. B. Hood, defendants who had been served in the action, appeared and filed in the said United States District Court a Notice of Motion and Motion to Deny Plaintiff's Application for a Motion *Pendente Lite* and to Strike Certain Portions of Plaintiff's Complaint, and to Dismiss Plaintiff's Complaint, a copy of which Notice of Motion and Motion is set forth at pages 30-32 inclusive of Transcript of Record.

On or about May 25, 1943, a hearing was had on said Motion before Honorable Peirson M. Hall, Judge presiding, at which time the Court ordered Items B-1, 2, 3, 5, 6,

7 and 8 of the Government's motion to strike from the complaint denied, and granted the motion to strike Item B-4 in part, and denied it in part, and ordered that Items 9 and 10 be granted on motion of plaintiff, and ordered paragraph 4 of the prayer of the complaint stricken on motion of plaintiff. That at said hearing the Court further ordered that the Motion for Injunction *Pendente Lite* be denied, and the complaint dismissed, counsel for plaintiff to prepare judgment of dismissal. [Transcript of Record, pp. 32-34, incl.]

Thereafter, on or about June 15, 1943, a Judgment was signed in which said action was dismissed as to said defendants Lt. Gen. John L. DeWitt, and R. B. Hood, on the ground that plaintiff's complaint did not state facts sufficient to constitute a cause of action, a copy of which Judgment is set forth at pages 35-37 Transcript of Record.

From this Judgment plaintiff-appellant appeals to the above-entitled Court.

Statement of Case.

This appeal is based upon the sworn Complaint filed in Action No. 2909-PH in the United States District Court in and for the Southern District of California, Central Division, by plaintiff-appellant Kenneth Alexander [Transcript of Record pp. 2-28, incl.] and upon the Government's pleadings in response thereto [Transcript of Record pp. 30-32, incl.], and upon the Government's Exhibits, the originals of which have been forwarded to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, pursuant to Stipulation *re* Exhibits. [Transcript of Record p. 41.]

Since the Government's pleadings have not denied any of the facts set forth in plaintiff's complaint, we are entitled to rely upon the facts set forth in said complaint, including the exhibits attached thereto, and upon the exhibits of defendants offered herein and forwarded to the Clerk of the Circuit Court as hereinabove referred to.

According to Executive Order No. 9066, dated February 19, 1942 [Appendix Exhibit A-1] the defendant, Lt. Gen. John L. DeWitt, as Military Commander of what is known as the Western Defense Command, was instructed by the President of the United States as follows:

"I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies."

This Proclamation was in force and effect on February 27, 1943.

At that time the plaintiff-appellant was a commercial photographer; a citizen of the United States and engaged in a specialty connected with his business in the City of Los Angeles, State of California.

Plaintiff-appellant had, in order to serve his country, enlisted in the United States Army at Schofield Barracks, T. H., on August 27, 1917, and was subsequently honorably discharged on account of physical disability [Transcript of Record pp. 3, 4].

Plaintiff-appellant re-enlisted in the United States Navy on April 9, 1918, at Washington, D. C., and served a four year enlistment, until honorably discharged on April 18, 1922, as chief photographer P. A. in New York City. [Par. 2, Plaintiff's Complaint; Tr. of Record p. 4.]

That on the 8th day of December, 1941, following the attack on Pearl Harbor, the plaintiff-appellant addressed a communication to Headquarters Air Force, Washington, D. C., making inquiry regarding his application already on file for enlistment in the Air Force of the United States Army [Transcript of Record p. 5] a copy of his application is attached to plaintiff's complaint and marked "Exhibit B" of said complaint. [Transcript of Record pp. 20, 21.]

That thereafter, not receiving an answer to his letter, he voluntarily enlisted in the United States Navy in Los Angeles on May 31, 1942, and served as a chief photographer P. A. until he was honorably discharged on September 25, 1942, from Pensacola, Florida, from which port he was returned to his home by the Navy and promptly reported to the Naval Intelligence Department of the United States Navy at Los Angeles and to the Federal Bureau of Investigation in said city, offering to make known to said organizations any information he had in his possession which would be of assistance to the United States Government. [Pars. III and IV of Complaint; Transcript of Record p. 5.]

That, not receiving a reply to his application, he entered employment at the Pacific Studios as a special commercial photographer and was regularly employed there until served with the notice and orders from Lt. Gen. John L. DeWitt, United States Army Commander.

That plaintiff-appellant represents that his only means of livelihood is to work at his profession, that of a photographer and photo technician. [Par. IV of Complaint; Transcript of Record p. 6.]

Plaintiff-appellant further shows that he has continuously maintained a legal residence in the United States and its territories since he became a citizen of the United States in the year 1915, having been originally a British subject, and has exercised his rights of franchise in different elections held in the United States during that time. [Par. III of Complaint; Transcript of Record p. 6.]

The complaint goes on to show the official standing of the various defendants, of whom only Lt. Gen. John L. DeWitt and R. B. Hood were served.

The records show that the following Executive Orders, Presidential Proclamations and Orders by Lt. Gen. John L. DeWitt which are material to this case were duly made and promulgated by the United States authorities, and are as follows:

First: Executive Order No. 9066, dated February 19, 1942 being an Order authorizing the Secretary of War to prescribe Military areas, which is attached to the appendix hereto and marked Exhibit "A-1".

Second: Extract from a letter from Hon. Henry L. Stimson, Secretary of War, to Commanding General DeWitt, dated February 20, 1942, which is attached to the appendix hereto and marked Exhibit "A-2".

Third: Public Proclamation No. 1, dated March 2, 1942, from the Presidio of San Francisco, California, by Lt. Gen. John L. DeWitt, which is attached to the appendix hereto and marked Exhibit "A-3".

Fourth: Public Proclamation No. 2, dated March 16, 1942, from the Presidio of San Francisco, California, by Lt. Gen. J. L. DeWitt, which is attached to the appendix hereto and marked Exhibit "A-4".

Fifth: Order signed by Secretary of War Hon. Henry L. Stimson, directed to Lieutenant General John L. DeWitt, dated July 15, 1942, attached to the appendix hereto and marked Exhibit "A-5".

That said Exhibits have been forwarded to this Honorable Appellate Court as part of the record in this case pursuant to stipulation, see page 41, Transcript of Record.

The complaint further shows that plaintiff-appellant is not a member of the Military Forces of the United States and is not subject to military law or control or orders of the officers of the United States Army or Navy [Complaint, par. X; Transcript of Record p. 12], and further:

That no martial law has been declared in the area from which, as will be hereafter shown, plaintiff-appellant was to be excluded by Military Order, or the area wherein plaintiff-appellant was to be confined. [Complaint, par. X; Transcript of Record p. 12.]

The complaint further shows that at all times the Courts in the State of California, State and Federal, have been open and have administered the same quality of justice heretofore meted out by them, and have been available to any party desiring to charge anyone of crime or wrongdoing. [Complaint, par. X; Transcript of Record p. 12.]

That on the 27th day of February, 1943, the Headquarters of the Western Defense Command and Fourth Army at the Presidio of San Francisco, California, issued a let-

ter or notice addressed to the plaintiff at 333 South Hope Street, Los Angeles, California, notifying him that a board of officers had been appointed by Commanding General, Western Defense Command and Fourth Army to consider whether military necessity required that he be ordered excluded from certain Military Areas of the Western Defense Command and other Defense Commands, and that the Board of Officers would be convened on Thursday, March 11, 1943, at the hour of 1:30 P. M. at Room 216 Rowan Building, 458 South Spring Street, in the City of Los Angeles, State of California, at which time he would be informed of the general nature and scope of the inquiry and afforded an opportunity to offer evidence in his own behalf and answer questions or make a statement under oath or affirmation. That all matters pertaining to the inquiry were confidential and plaintiff's appearance before the Board was optional on his part; that he might be accompanied by counsel as his personal advisor, but counsel would not be heard by the Board, nor would he be permitted to examine witnesses. A copy of said notice is attached to plaintiff's complaint and is found at pages 23-25 of Transcript of Record.

That thereafter, and on the 11th day of March, 1943, at the place and at the time indicated by said summons or communication as above set forth the plaintiff-appellant was notified that the said hearing would be held at the Biltmore Hotel in the aforesaid City of Los Angeles, where he was confronted by certain persons who were joined in this suit as defendants DOE 1, DOE 2 and DOE 3; that said persons representing themselves to be a board of inquiry, made inquiries in detail into plaintiff's occupation and relative to his activities in political organizations and as to his politics and as to his religion, and inquired of

plaintiff if he possessed any psychic power by which he communicated with different parties in the United States.

That plaintiff was denied an opportunity to acquaint himself with or to examine any information in possession of the Board which might have been detrimental to his interest, nor was he advised that the Board had any information of that character.

That plaintiff was advised that much of the information about which they made inquiry was based upon rumor which had been communicated to the Board by parties unknown to plaintiff and whose identity the Board refused to make known to plaintiff.

That plaintiff was not given an opportunity to be confronted by witnesses against him, if there were any, and if there were any such witnesses their testimony was taken without affording plaintiff an opportunity to be present at the taking of such testimony or to cross-examine such witnesses or to otherwise and in any manner or form to refute any such testimony.

That plaintiff was without counsel and was not permitted in any way to participate in said proceeding except to answer questions and interrogatories that were propounded to him. [Complaint, par. VI; Transcript of Record pp. 7-9.]

That thereafter, and on the 21st day of April, 1943, plaintiff was served with a copy of an Individual Exclusion Order No. 1K-7, dated April 14, 1943, a copy of which said Individual Exclusion Order is attached to plaintiff's complaint and is found at pages 26-28 of Transcript of Record.

That the said Exclusion Order No. 1K-7, purported to exclude plaintiff within ten days from the date of service

of said order from the States of California, Arizona, Oregon, and Washington on the West Coast of the United States, and also to exclude the plaintiff-appellant from the date of service of the order from the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, the District of Columbia, and a part of the State of Florida, as defined and designated by Proclamation No. 1, dated May 16, 1942, Headquarters Eastern Defense Command and First Army, Governor's Island, New York, H. A. DRUM, Lt. Gen. United States Army, Commanding; and from entering into, being in or remaining in, from and after said date, Military Area No. 1 of Florida, Military Area No. 1 of Alabama, Military Area No. 1 of Mississippi, Military Area No. 1 of Louisiana, Military Area No. 1 of Texas and Military Area No. 1 of New Mexico, as defined and designated by Public Proclamation No. 1, dated May 30, 1942, Headquarters Southern Defense Command, San Antonio, Texas, WALTER KREUGER, Lt. Gen., United States Army Commanding. [Complaint, par. VII; Transcript of Record pp. 9-10.]

That plaintiff applied in writing to the defendant Lt. Gen. John L. DeWitt on April 28, 1943, requesting and petitioning that said defendant cancel said Order of Exclusion, or to extend the time to a period longer than 10 days, and requested that the United States Government furnish to the plaintiff compensation equal to that which he could earn at his trade or profession until such time as he could secure employment in his profession, and further petitioned and requested of said defendant that the United States Government furnish him with support and

sustenance until such time as he could secure employment in the event the Order of Exclusion was carried out and plaintiff was sent to some section of the United States where he was without friends or acquaintances, and plaintiff was advised by the defendant, L. G. WHITE, Investigator for Headquarters Western Defense Command and Fourth Army, on April 30, 1943, that his petition was wholly denied. [Complaint, par. VIII; Transcript of Record pp. 10-11.]

Plaintiff further alleges in said complaint, and it is not denied, the following:

“Plaintiff at all times since residing in the United States and its territories has conducted himself as a respectable and law-abiding citizen; that he has never been charged with a violation of the penal laws of the United States or any of the states or territories within the United States; that by reason of plaintiff’s conduct, he has established a reputation for honor, truth and veracity and is a peaceable, law-abiding American citizen; that the Order of Exclusion, referred to as Exhibit ‘F’, in effect convicts plaintiff of being disloyal to the United States and publishes to the world that he is disloyal and a dangerous citizen to the extent that he is not permitted to reside in the United States except at those places designated by the defendants; that the information upon which the Order of Exclusion was issued was and is wholly false; that no ground or basis exists for such an order, and that this fact can and will be established by competent legal evidence if the plaintiff is given an opportunity to present witnesses and to have a hearing or a trial before this Honorable Court.” [Complaint, par. IX, Transcript of Record pp. 11 and 12.]

The plaintiff-appellant further charges that since April 14, 1943, the defendants-appellees, including the defendants who were served in this case, have enforced and are enforcing said orders at the present time, and they have threatened and intend to carry out and enforce said orders and each of them and will, unless restrained from so doing by order of this Court, carry out and execute each of said orders.

Brief Statement of Questions Involved in the Appeal.

FIRST.

WERE THE ALLEGATIONS SET FORTH IN PLAINTIFF-APPELLANT'S COMPLAINT SUFFICIENTLY PLEADED TO ENTITLE HIM TO THE REMEDY PRAYED FOR, OR TO ANY REMEDY TO BE GRANTED BY THE UNITED STATES COURTS?

SECOND.

WAS THE MILITARY TRIBUNAL WHICH TRIED PLAINTIFF-APPELLANT, AND ENTERED AN ORDER DEPORTING HIM FROM THE WESTERN DEFENSE COMMAND, A COMPETENT TRIBUNAL TO PERFORM SUCH ACTS?

THIRD.

DOES PLAINTIFF-APPELLANT'S MOTION FOR INJUNCTION PENDENTE LITE, TOGETHER WITH HIS OTHER PLEADINGS IN SAID CAUSE OF ACTION, ENTITLE SAID PLAINTIFF-APPELLANT TO A TEMPORARY INJUNCTION RESTRAINING THE DEFENDANTS FROM ENFORCING THE ORDER OF THE MILITARY TRIBUNAL PENDING THE TRIAL OF THIS SUIT?

ARGUMENT.

POINT I.

That the Court Erred in Dismissing the Complaint of the Plaintiff-Appellant Wherein He Prayed for an Injunction and Damages Against the Defendants-Appellees Herein.

It must be remembered that the plaintiff-appellant filed a complaint in the District Court of the United States, in and for the Southern District of California, Central Division, wherein he prayed that the Court take jurisdiction of the facts set forth in the complaint, as the same was founded upon a Federal question arising under the Constitution of the United States. [Complaint, par. I; Transcript of Record pp. 2-3.]

The complaint further alleged that plaintiff-appellant was a naturalized citizen of the United States of America, born in London, England, and, desiring to serve the country of his adoption, had enlisted in the United States Army at Schofield Barracks, T. H., on August 27, 1917 and was subsequently honorably discharged on October 16, 1917, on account of physical disability. These facts are not contradicted by these defendants-appellees or their attorney, the United States Attorney, and, therefore, in considering this appeal they must be taken as proved.

The complaint of the plaintiff-appellant further alleged that this plaintiff-appellant had at divers times, both in peace and war, served in the Army and Navy of the United States and had always been honorably discharged. [Transcript of Record pp. 3-6.] These allegations are not disputed by the defendants-appellees or their counsel and, therefore, must be considered as proved.

The complaint further alleged that plaintiff-appellant's only means of livelihood is working at his profession as a photographer and photo technician, and that he has continuously maintained a legal residence in the United States and its territories since he became a citizen of the United States in the year 1915, and has exercised his right of franchise in different elections held in the United States during said time. These allegations are also uncontradicted and, therefore, must be taken as true and proved.

It is further uncontradicted by the defendants-appellees or their counsel, and therefore, must be considered as proved, that plaintiff-appellant secured employment at his profession as a photographer at the Pacific Studios, in the City of Los Angeles, County of Los Angeles, State of California, and has been regularly employed there until served with notices and orders from Lt. Gen. John L. DeWitt, United States Army Commander, as hereinafter set forth.

The complaint further alleged that Lt. Gen. John L. DeWitt is the Commanding General of the United States Army of the Western Defense Command and Fourth Army, comprising an extended area along the Pacific Coast of the United States, and the headquarters and residence of said Lt. Gen. John L. Dewitt are at Presidio, San Francisco, California.

That, further, defendant R. B. Hood is a Special Agent of the United States Department of Justice located at Los Angeles, California. These allegations are not denied and, therefore, must be taken as proved.

The complaint further names a number of other defendants, none of whom had been served at the time this complaint was argued before the United States District

Judge and, therefore, the motion of dismissal was granted only as to these two defendants who now are defendants-appellees.

The complaint further alleged that each of the defendants named in the complaint, including R. B. Hood, was under the order and control of the defendant-appellee Lt. Gen. John L. DeWitt. These allegations are not denied and, therefore, must be taken as proved.

The complaint further alleged as follows:

“Defendant R. B. Hood is a Special Agent in Charge of the Federal Bureau of Investigation of the United States Department of Justice located at Los Angeles, California.

“Defendant L. G. White is an Investigator for the Headquarters of the Western Defense Command, Fourth Army of the United States, stationed at Los Angeles, California.

“Defendant L. F. Sloan is the Supervising Officer in charge of the War Relocation Authority at Los Angeles, California.

“Upon information and belief the plaintiff alleges that each of said defendants is under the orders and control of the defendant Lt. Gen. John L. DeWitt.”

The complaint further alleges as follows:

“On February 27, 1943, defendant Randell Larson, Lt. Col., F. A., acting under the orders and control of Lt. Gen. John L. DeWitt, caused to be executed an order signed by him in his capacity as an officer of the Headquarters of the Western Defense Command and Fourth Army in charge of the Individual Exclusion Hearing Board, addressed to the plaintiff, advising plaintiff that on Tuesday, March

11, 1943, at 1:30 P. M. at room 216, Rowan Building, 458 South Spring Street, Los Angeles, California, an inquiry would be made at said time and place, and requesting the plaintiff to advise at least 24 hours prior to the time of hearing if he intended to appear. Copy of said communication is attached hereto, made a part hereof, and marked Exhibit 'E'. Said communication advised plaintiff that he might be accompanied by counsel to act as his personal advisor, but he was advised that any counsel who might represent him would not be heard by the Board and that said counsel would not be permitted to examine witnesses. The communication also advised that the inquiry by the Board was in no sense a criminal proceeding and that plaintiff was not charged by the communication with any penal offense.

"That on March 11, 1943, at the place and at the time directed in said summons or communication, plaintiff appeared before the so-called Individual Exclusion Hearing Board and was advised that said hearing was to be held in a room at the Biltmore Hotel; that thereafter and forthwith the plaintiff went to a room in the Biltmore Hotel in the City of Los Angeles, California, as directed, where he was confronted by defendants DOE ONE, DOE TWO and DOE THREE. Said parties required plaintiff to take oath as to all recitals made by him. The said Board representing themselves to be a board of inquiry, made inquiries in detail into plaintiff's occupation and relative to his activities in political organizations, and as to his politics and his religion, and inquired of plaintiff if he possessed any psychic power by which he communicated with different parties in the United States.

“Plaintiff was denied an opportunity to examine any information in possession of the Board which might have been detrimental to his interest, nor was he advised that the Board had any information of that character. Plaintiff was advised that much of the information about which they made inquiry was based upon *rumor* which had been communicated to the Board by parties unknown to plaintiff and whose identity the Board refused to make known to plaintiff. Plaintiff was not given an opportunity to be confronted by witnesses against him if there were any, and if there were any such witnesses their testimony was taken without affording plaintiff an opportunity to be present at the taking of such testimony or to cross-examine such witnesses or to otherwise and in any manner or form to refute any such testimony. Plaintiff was without counsel and was not permitted in any way to participate in said proceeding except to answer questions and interrogatories that were propounded to him.”

The complaint further alleged as follows:

“That on April 21, 1943, plaintiff was served with a copy of an Individual Exclusion Order No. 1K-7, dated April 14, 1943. A copy of said Individual Exclusion Order is attached hereto, made a part hereof and marked Exhibit F. Said Individual Exclusion Order No. 1K-7 purports to exclude plaintiff within ten (10) days from date of service of said order from the States of California, Arizona, Oregon and Washington on the West Coast of the United States, and also excludes plaintiff from date of service of the order from the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Dela-

ware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, the District of Columbia, and a part of the State of Florida, as defined and designated by Proclamation No. 1, dated May 16, 1942, Headquarters Eastern Defense Command, First Army, Governors Island, New York, H. A. DRUMM, Lt. Gen., United States Army, Commanding; and from entering into, being in or remaining in, from and after said date, Military Area No. 1 of Florida, Military Area No. 1 of Alabama, Military Area No. 1 of Mississippi, Military Area No. 1 of Louisiana, Military Area No. 1 of Texas and Military Area No. 1 of New Mexico, as defined and designated by Public Proclamation No. 1, dated May 30, 1942, Headquarters Southern Defense Command, San Antonio, Texas, WALTER KRUEGER, Lt. Gen., United States Army, Commanding."

The complaint further alleged that plaintiff-appellant applied in writing to the defendant-appellee Lt. Gen. John L. DeWitt on April 28, 1943 (and before the date set for the execution of Military Order set forth above) requesting and petitioning said John L. DeWitt, as Lt. Gen. and in charge of the proceedings against this plaintiff-appellant to cancel said Order of Exclusion or to extend the time to a period longer than ten days and that he received no answer thereto; and that since April 14, 1943 the defendants-appellees have enforced, and are enforcing at the present time, and they have threatened and intend to carry out and enforce said Orders and each of them, and will, unless restrained from so doing by an order of the United States District Court, carry out and execute each of said orders. These allegations in the complaint are not denied by the defendants-appellees, or by their counsel, and, therefore, must be taken as true and proved.

The complaint of the plaintiff-appellant further alleged as follows:

“1—*The Exclusion Order.*

“The Order of Exclusion aforesaid has the effect of completely prohibiting the plaintiff from practicing his present occupation for the reason that at the present time there are no opportunities for the plaintiff to follow his said occupation as a photographer and photo technician in any community outside of the Western Defense Command, and from all of said area plaintiff is by said Order excluded. That said Order of Exclusion will make it impossible for the plaintiff to secure employment in his profession or trade; that the plaintiff is an experienced photographer and photo technician, has earned and is capable of earning a salary of \$200.00 or more per week; that the enforcement of said Order will deprive the plaintiff of the right to follow his profession to earn a livelihood.

“Additionally the enforcement of said Order will abridge the constitutional rights of the plaintiff, including:

“a—The right of the plaintiff to freedom of religion, freedom of speech, freedom of the press, freedom of assemblage, and the right to petition the Government for a redress of grievance.

“b—The plaintiff’s right to a fair and full hearing, to be informed of the nature or cause of any accusation against him, to a presentment or an indictment of a grand jury, to a public trial, to a trial by jury, and to counsel.

“c—The right of the plaintiff to establish and maintain a home, the right to free movement; and the right to equality of treatment under the law and to

be free from discrimination and persecution solely because of his religious and economic views; said rights and each of them are of a value in excess of \$3,000.00, exclusive of interest and costs.

“The restraint imposed upon the plaintiff by virtue of said letter order has up to the present time resulted in damage to the plaintiff in a sum in excess of \$3,000.00 and costs; and the continuing enforcement of said orders will result in further damage to this plaintiff.

“Additionally, the plaintiff has been damaged in a sum in excess of \$3,000.00, exclusive of interest and costs, because said letter order constitutes an abridgment of the rights of the petitioner as guaranteed by the United States Constitution.

“That plaintiff has already suffered irreparable injury by the enforcement by the defendants of the orders aforesaid, and will continue to suffer irreparable injury by virtue of the enforcement of said orders, unless said enforcement is restrained by orders of this court. Plaintiff does not have an adequate remedy at law.

“The acts of the defendants aforesaid, and the threatened acts of the defendants as hereinbefore stated have abridged and threaten to abridge, respectively, the following constitutional rights of the plaintiff:

“1—*The First Amendment*—The right of the plaintiff to freedom of religion, freedom of speech, freedom of the press, freedom of assemblage, and the right to petition the Government for a redress of grievances.

“2—*The Fifth Amendment*—The rights to liberty and property and more particularly, the right to

earn a livelihood and engage in his profession or trade, the right to establish and maintain a home, the right to free movement; and the right to equality of treatment under the law and to be free from discrimination and persecution solely because of religious and economic views.

“3—*The Sixth Amendment*—The rights to a fair and full hearing, to be informed of the nature or cause of any accusation against him, to a presentment or an indictment of a grand jury, to a public trial, to a trial by jury, and to counsel.”

For a fuller and more complete statement of the allegations set forth by the plaintiff-appellant in his complaint, counsel refer to the complaint [as set forth in Transcript of Record pp. 2-28.]

The uncontradicted pleadings show that the plaintiff-appellant is a citizen of the United States, residing in the State of California, a civilian not attached in any way to either the Military, Naval or Defense Forces of the United States, and entitled to all the rights and privileges accorded him under the First, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. His record is absolutely clean as to any matter that could be considered dangerous to the public of the United States or any citizens of California in the present war which the United States is waging against Japan, Italy and Germany.

At no time has the Military Command, of which Lt. Gen. John L. DeWitt is the head and R. B. Hood is the

representative of the Prosecution Department of the United States Government been in command of any portion of the United States in which martial law had been declared, nor at any time during which either Lt. Gen. John L. DeWitt or R. B. Hood held office had the Federal or State Courts of California and of the Southern District, Central Division, ceased to function in their usual and proper course of hearing any charges, both criminal and civil, against citizens for violation of law; and at the time the orders set forth in said complaint were made, both the Federal Court and Supreme Court of the State of California were properly functioning with full control of all the rights given them by the State of California and the laws of the United States to govern and control any charge made against civilian citizens residing within the jurisdiction of said courts.

There is no evidence before the Court that at any time the plaintiff-appellant was guilty of any criminal or civil offense against the state laws or the laws of the United States. On the other hand, the entire record before this Court shows that not only has the plaintiff-appellant done his full duty as a civilian citizen of the United States, but he has served loyally and honorably in the United States Armed Forces in peace and war and during two wars in which the United States was engaged.

There is no allegation whatsoever, and it is distinctly denied by the pleadings before the Court, that this plaintiff-appellant in any hearing which he was given was accorded the speedy and public trial declared to be his right

under the Sixth Amendment to the Constitution of the United States, and it is likewise shown by the pleadings that the only actions against this plaintiff-appellant were arbitrary actions by a Military tribunal setting itself up in derogation of the rights of the United States Federal Courts and the protection given to the citizens of the United States by the Bill of Rights, set forth in the Amendments to the United States Constitution.

The United States Courts have had no hesitancy in declaring, in many trials and on many occasions, that, where the officials of a Federal Executive Department have acted in excess of the jurisdiction granted them, or in violation of the Constitution of the United States, the United States Court will enjoin them from carrying out the orders which they have so made.

In support of these statements, counsel respectfully submit the following decisions:

Goltra v. Weeks, 271 U. S. 536 (1926) (Army Officials enjoined);

Lane v. Watts, 234 U. S. 525 (1914) (Secretary of Interior enjoined);

Perkins v. Elg, 307 U. S. 325 (1939) (Secretary of Labor enjoined);

U. S. v. Nourse, 9 Pet. (U. S.) 8 (1835);

Houston v. Ormes, 252 U. S. 469 (1920);

Lipke v. Lederer, 259 U. S. 557.

(in each of the above, Treasury Officials enjoined).

Injunction Is the Appropriate Remedy to Challenge Illegal Action by Officials of a Federal Executive Department.

Waite v. Macy, 246 U. S. 606;

Work v. Louisiana, 269 U. S. 250 (1925).

The Courts Have the Duty and Authority to and They Will Adjudicate the Validity of Military Orders.

1—The judicial power is lodged exclusively in the Courts of the United States.

U. S. Constitution, Art. III, Sec. 1.

2—The limits of military discretion are to be determined by the Courts.

Ex parte Quirin, 87 L. Ed. (Advance Opinions) 1;

Ex parte Milligan, 4 Wall. 2;

Ex parte Orozco, 201 Fed. 106, at pages 110-118.

What are allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.

Sterling v. Constantin, 287 U. S. 378.

The Minimum Requirements of Due Process Contemplate at Least a Fair Hearing.

U. S. ex rel. Vajtauer v. Commissioner of Immigration, 273 U. S. 103 at p. 106;

Truax v. Corrigan, 257 U. S. 312, at p. 332;

Hurtado v. California, 110 U. S. 516, at pp. 534-535;

Holden v. Hardy, 169 U. S. 366, at p. 389;
Palko v. Conn., 302 U. S. 319, at p. 327;
Hansberry v. Lee, 311 U. S. 32;
Snyder v. Mass., 291 U. S. 97, at pp. 105-106;
Powell v. Ala., 287 U. S. 45, at pp. 67-68 (1932);
*Ohio Bell Telephone Company v. Public Utilities
Commission*, 301 U. S. 292, at p. 304;
*Railroad Commission of California v. Pacific Gas
& Electric Co.*, 302 U. S. 388, at p. 393;
Morgan v. U. S., 304 U. S. 1, 14.

Plaintiff-appellant was a civilian citizen following his occupation in a lawful and legal manner according to the uncontradicted pleadings before this Court. His right so to do without unreasonable abridgment of the rights set forth in the Amendments to the Constitution of the United States under "Due Process of Law" has been well settled:

Allgeyer v. Louisiana, 165 U. S. 578;
Meyer v. Nebraska, 262 U. S. 390, at p. 399;
Edwards v. California, 314 U. S. 160, at pp. 182-185.

POINT II.

That the Military Tribunal Which Took Upon Itself to Try and Convict Plaintiff-Appellant, and Which Ordered Him Out of the Western Defense Command Was Not Competent so to Do Especially, in View of the Fact That by the Terms of Its Own Documents It Excluded the Plaintiff-Appellant From the Protection of All of the Rights Given to Every American Citizen by the Amendments to the United States Constitution Commonly Known as the "Bill of Rights."

There is no question but that the plaintiff-appellant could have been tried and punished by the ordinary civil tribunals if he had violated any law.

These civil tribunals—both State and Federal—have always been open in the State of California and in the jurisdiction of the United States District Court for the Southern District, Central Division. Their regular proceedings have not been interrupted and their processes have been regularly executed. This Court will take judicial notice of these facts, and certainly must take judicial notice that the sittings of the said Courts have ever been, and now are, uninterrupted.

Nothing in the allegations made by the United States Attorney as counsel for the defendants-appellees, or set forth in the so-called Military Orders or in the complaint of the plaintiff-appellant, even suggested that the regular course of justice was or ever had been, impeded. All that the Military Orders pretended was that any acts

charged against the plaintiff-appellant were done during a period of war, and that military necessity required that he be ordered excluded from certain military areas of the Western Defense Command, the Southern Command and the Eastern Command, because military necessity required that he be removed from said zones.

The plaintiff is a simple citizen, not belonging to the Army or Navy or holding any official position, and not connected in any manner with the public service. He is in the position of every other citizen who might fall under suspicion.

The evidence against the plaintiff is not stated in the Military Orders and is immaterial. His guilt or his innocence does not affect the question of the competency of the tribunal by which he was judged.

What he disputes, and what his counsel dispute, is the jurisdiction of the Military Tribunal to decide the issues of guilt or innocence.

What is a Military Tribunal? Is it a body known to the laws? Is it a Court Martial under another name? All we know is that it is a board of military officers convened by a military commander under color of military authority.

Has this board any sanction, as a judicial body, from any Act of Congress? We have not found any such power.

It is claimed that it has power under Executive Order No. 9066, dated February 19, 1942, to consider whether military necessity requires that a citizen be ordered excluded from certain military areas.

There being no Act of Congress for the establishment of the tribunal, it depends entirely upon the executive will for its creation and support.

This brings up the true question now before the Court: Has the President in time of war, by his own will and judgment of the military, power to bring before the military officers any citizen, man or woman, in the land to be there subjected to trial and punishment by said Military Tribunal?

If the President has this lawful power, from whence does he derive it? From the Constitution? It cannot be found there. He can exercise no power whatsoever but that which the Constitution of the country gives him. Beyond it, he has no more power than any other citizen. Our system knows of no authority beyond or above the law.

We may, therefore, dismiss from our minds every thought of the President having any prerogative as the representative of the people or as an interpreter of the popular will. He is selected by the people to perform those functions and those only which the Constitution of his country and the laws, made pursuant to that Constitution, confer.

The powers and attributes of the presidential office are in the Second Article of the Constitution.

FIRST: He shall be the chief executive.

SECOND: He is Commander-in-Chief of the Army and Navy of the United States and the Militia of the several states when called into the actual service of the United States.

THIRD: He is to take care that the laws be faithfully executed.

The executive power given him is the executive power of the United States. He is not clothed with any executive power except as he is specifically directed by some other part of the Constitution, or by an Act of Congress.

The President is to take care that the laws be faithfully executed. He is to execute the laws by the means, and in the manner which the laws prescribe; the laws provide not only WHAT is done, but the MANNER of doing it, and all these the President is to execute.

Does the authority making him the Commander-in-Chief of the Army and Navy and Militia of the States when called into Federal service permit him by proclamation to create a judicial body which shall have the rights of liberty over civilian citizens in places where the judicial authority has already been set up and is functioning?

Does the authority to command an army carry with it the authority to arrest and try civilians by military code?

These questions seem to be easily answered. To command an army, whether in camp, on the march, or in battle, requires the control of no other persons than the officers and soldiers.

It cannot be supposed that if Congress failed to provide the means of recruiting, the Commander-in-Chief could lawfully force civilians into the ranks of the armed forces.

What is called the "war power" of the President is nothing more than commanding the armies and fleets which Congress causes to be raised; to command these means to direct their operation.

There is no power in the Constitution whereby the President, by his mere will, can create military commis-

sions for the trial of persons not military for any cause whatsoever. The Amendments to the Constitution, which are known as the Bill of Rights, were passed for the state of war as well as peace. One has only to read them to know this is true. They were enacted to control military authority as well as the civil authority. The language is clear and unmistakable. There is no room left for interpretation.

If one should set himself to the task of expressing more clearly the intention to limit the military jurisdiction, he would find it hard to choose better words.

We contend that military tribunals for civilians, or non-military persons, are, whether in peace or war, inconsistent with the liberty of the civilian and can have no place in constitutional government, and our Supreme Court has repeated this doctrine in many cases.

Our approach to this case is one in substantial accord with the views of the Supreme Court as expressed at the time of a war three-quarters of a century ago:

“The Constitution of the United States is a law for rulers and people, equally in war and peace and covers with the shield of its protection all classes of men, at all times and under all circumstances.”

Ex parte Milligan, 4 Wall., at p. 121.

In the case of *Sterling v. Constantin*, 287 U. S., page 378, is authority for the following proposition:

In that case the Court ruled (page 401):

“What are the allowable limits of military discretion, and whether or not they have been overstepped in a *particular case*, are *judicial questions*.”

In the *Sterling* case the Court laid down the rule that a military measure is consistent with the Constitution if it is made:

- i—In the face of an emergency,
- ii—In good faith, and
- iii—Is “*directly related*” to the emergency—that is, applied and enforced *in the particular case*.

The rule in the *Sterling* case follows and approves the criteria established in *Mitchell v. Harmony*, 13 Howard 115, 134, namely that in all cases in which military orders short-cut and eliminate judicial process, there must be a showing that “the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for.”

The above is quoted in the *Sterling* case at page 401.

The Rudimentary Demands of Justice Incorporated Within the Concept of Due Process of Law, Make a Fair and Full Hearing Mandatory.

As was said in *Traux v. Corrigan*, 257 U. S. 312, “*This is the very essence of due process of law. . . .*”

The Existence of War Does Not Suspend the Constitution, Nor Abrogate the Bill of Rights.

The above has been made clear by the Supreme Court in *Ex parte Quirin, supra*, in which *Ex parte Milligan*, 4 Wall. 2, was followed and approved.

Compare also *United States v. Viereck*, United States Supreme Court, March 1, 1943, 87 L. Ed. (Advance Opinion) 529.

In a war case, *United States v. Cohen Grocery Co.*, 255 U. S. 81, at 88, while adjusting unconstitutional *war-time* Congressional action, the Court declared:

“We are of opinion that the court below was clearly right in ruling that the decisions of this Court undisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon.”

Citing *Ex parte Milligan* and many other cases, the Court concluded at p. 89:

“It follows that, in testing the operations of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes negligible, and we put it out of view.”

Similarly, in *United States v. Bernstein*, 267 Fed. 295 at 296, in holding the Lever Act unconstitutional (held invalid by the Supreme Court in the *Cohen* case) the court held that when rights:

“. . . guaranteed by the Constitution are invoked before this court no exigencies of war, or incidents, or aftermath of war, can justify their denial. The validity of war measures must equally stand the test of constitutional limitations and must fall, if rights guaranteed by the fundamental law are infringed or taken away.”

Casserly v. Wheeler, 282 Fed. 389, at 393 (9th Cir.), took the same view.

“It is urged that this arrest was made at the high tide of the prosecution of the war, . . . This is

all very true; but the civil law had not been suspended . . . The constitutional right of the citizen not to be deprived of his liberty without due process of law . . . was just as secure to the citizen at the time of the plaintiff's arrest as at any time since the organization of the government."

Similarly in *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, at 426, the court ruled that the:

"War power . . . is the power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. *But even the war power does not remove constitutional limitations safeguarding essential liberties.*" (Emphasis ours.)

The Court, speaking through Justice Brandeis, recognized the paramount authority of the Constitution in war time equally as in peace time in *Hamilton v. Kentucky Distilleries*, 251 U. S. 146, at 156:

"The war power of the United States, like its other powers and like the police power of the States, is subject to applicable constitutional limitations."

And in *Sterling v. Constantin, supra*, at page 398, the court pointed out that even as to the military authorities, "there is no such avenue of escape from the paramount authority of the Federal Constitution."

In *Thornhill v. Alabama*, 310 U. S. 88, at 95-96, this Court definitely determined:

"Mere legislative preference for one rather than another means for combatting substantive evils,

therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations."

Ex parte Milligan, supra, and *Sterling v. Constantin*, 287 U. S. 378, are authority for the proposition that the constitutional test applicable to legislative enactments applies equally to military fiats.

"Accordingly, upon a *prima facie* showing by the plaintiff of a denial, by virtue of a military order, of rights ordinarily guaranteed by the Bill of Rights, *the burden shifts to him who seeks to justify such denial to support the order*, and to advance the reasons for the order. The duty then falls upon the courts to 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced.'" (Emphasis ours.)

If these decisions did not constitute the law of the land as a true definition of the rights of the citizen, given him by the United States Constitution, then the President would become, in time of war, an actual dictator. He could swallow up every other power in the State.

If any governor of any state or any state legislature, or any of the courts of the states should stand in his way, the military tribunal would be at hand to try, and the military organization to arrest and execute. No longer

would the courts of this country—and especially the Appellate Court of the land be sacred, for they would be answerable as individuals to the military tribunal like other civilians—for if the war power may judge one civilian, it may judge all civilians.

If this war power belongs to the commander-in-chief as commander of the whole army, it belongs to every other commander in his own sphere.

The governor of each state is as much a commander-in-chief of the state forces as the President is commander-in-chief of the national forces.

Freedom is the rule, restraint the exception; this is the import of the Court's decision in *Herndon v. Lowry*, 301 U. S. 242.

If the power to try civilians for violations of the law of the land is independent of the legislative power, or the judicial power, then who can say that we are living in "a Democracy rather than in a tyranny such as proclaimed and carried on by the dictators of Europe"?

The Supreme Court of the United States has not been hesitant in declaring that acts such as set forth in the petition of the plaintiff-appellant cannot be countenanced under our democratic form of government.

Chief Justice Chase—*Ex parte Milligan*, 4 Wallace, at page 132 says:

"The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which here must be taken as

true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized, though merited, justice.

“The trial and sentence of Milligan were by military commission convened in Indiana during the fall of 1864. The action of the commission had been under consideration by President Lincoln for some-time, when he himself became the victim of an abhorred conspiracy. It was approved by his successor in May, 1865, and the sentence was ordered to be carried into execution. The proceedings, therefore, had the fullest sanction of the government. This sanction requires the most respectful and careful consideration of this court. The sentence which it supports must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress.”

In the late case, *Sterling v. Constantin*, 287 U. S. 378, pages 402-403, the Supreme Court of the United States, in referring to the action of the Governor of Texas in proclaiming martial law in certain counties under the facts set forth in that case, was held improper and a

violation of the rights of a person to control his own property; the Court said:

“The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the ‘military independent of and superior to the civil power’ . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.”

POINT III.

Plaintiff-Appellant's Motion for Injunction Pendente Lite, Together With His Other Pleadings in the Case, Not Being Contradicted as to Facts, Should Have Entitled, and Does Entitle, Plaintiff-Appellant to a Temporary Injunction Restraining Defendants From Enforcing the Order of the Military Tribunal Pending the Trial of This Suit.

The right of this Court to interfere by injunction with a void or illegal order has been fully dealt with in the former portion of this brief.

To summarize the law as to the same, counsel ask permission to quote the following cases:

In *Waite v. Macy*, 246 U. S. 606, the syllabus asserts, page 607:

The Board of General Appraisers may be enjoined from enforcing a rule promulgated by the Secretary of the Treasury which necessitates the exclusion of an imported tea.

Also, *Work v. Louisiana*, 269 U. S. 250, at page 251, where the Secretary of the Interior was enjoined by the State of Louisiana relative to its production of a swamp land claim under a State Act.

The Supreme Court has also enjoined the Secretary of War in regards to the disposal of a fleet of ships.

In *Lane (Sec. of Interior) v. Watts*, 234 U. S. at page 525, the syllabus states:

The Secretary of the Interior and the Commissioner of the General Land Office may be enjoined

from casting a cloud on a title vested by an approved location of a grant.

The Court held—*Perkins v. Elg*, 307 U. S. page 325, that the granting of an injunction against the refusal by the Secretary of Labor to issue a passport to a person whose nationality was in dispute was the proper remedy.

It is the duty of the Court to adjudicate the validity of military orders.

A. The judicial power is lodged exclusively in the Courts of the United States.

United States Constitution, Art. III, Sec. 1.

B. The limits of military discretion are to be determined by the Courts.

Ex parte Quirin, 87 L. Ed. (Advance Opinions) 1;

Ex parte Milligan, 4 Wall. 2;

Ex parte Orozco, 201 Fed. 106.

“What are allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”

Sterling v. Constantin, 287 U. S. 378, at 401.

In the case at bar, the sworn complaint, the facts of which are uncontradicted, shows that the plaintiff-appellant had been ordered, on the 14th day of April, 1943, by military order to leave the State of California “within 48 hours after service upon him of this order.”

It is further proved by the statements in plaintiff’s complaint that the time had expired under the terms of the order, and that “the defendants have since April 14, 1943,

enforced, and are enforcing said orders at the peresent time, and they have threatened, and they intend to, carry out and enforce said orders and each of them; and will, unless restrained from so doing by order of this Court, carry out and execute each of said orders.” [Complaint, Par. XIII, Tr. of Record, p. 14.]

The District Court should have assumed, and this Court must assume, that these allegations are true.

In the Military Proclamation of the President of the United States No. 9066, under which order the defendants-appellees are acting in this case, the President of the United States said:

“I hereby further authorize and direct the Secretary of War and the said Military Commander to take such other steps as he, or the military commander, may deem advisable to enforce compliance with the instructions applicable to each area hereinabove authorized to be designated, including the use of Federal troops and also Federal agencies, with authority to accept assistance of state and local agencies.” (See Exhibit “A-1” to Appendix of Brief, page 1.)

Therefore, the situation of the plaintiff-appellant at the time he made his application for an injunction *pendente lite* was precarious; the time within which he had been ordered to leave the State of California had passed; the President of the United States had instructed the defendants-appellees that they could use the Federal soldiers of the United States to enforce compliance with this order. After he had been seized by the Federal troops and taken from the State of California, a writ of habeas corpus, or any other proceeding, would have been to no avail.

We believe the best exposition of the law applicable to the facts in this case is contained in a recent opinion rendered by the Honorable J. Cullen Ganey, Judge of the District Court of the United States, for the Eastern District of Pennsylvania, in the case of *Olga Schueller v. H. A. Drum, Lieutenant General of the United States Army*, No. 3151.

In the *Schueller* case the situation was almost identical with that in the case at bar. While Judge Ganey's opinion represents the opinion of a District Court and is, of course, not binding as precedent upon a Circuit Court of Appeals, nevertheless we feel that the law is so well stated therein that this Court will find the opinion of great assistance. For that reason, we are copying Judge Ganey's complete opinion into this brief, as it is not available to this Court from other sources, as follows:

"In the District Court of the United States, for the Eastern District of Pennsylvania.

Olga Schueller v. H. A. Drum, Lieutenant General of the United States Army. No. 3151.

Opinion (Filed Aug. 20, 1943)

J. Cullen Ganey

Ganey, J.:

August 20, 1943.

This is a petition for a declaratory judgment. The petition in substance, alleges that the petitioner is a naturalized citizen of the United States, residing in Philadelphia; that on or about December 23, 1942, upon the request of military authorities of the United States she voluntarily appeared before them and testified, in answer to questions propounded to her concerning her membership in various German clubs; that no charges were presented against her; that she only testified herself, and did not present the testi-

mony of others, nor did she offer any rebuttal of any information which may have been in the possession of the military authorities; that on April 26, 1943, Lieutenant-General H. A. Drum of the Eastern Defense Command and First Army of the United States issued and served upon her, allegedly under authority vested in him under Executive Order No. 9066, and pursuant to a determination made in accordance with provisions of paragraph 9A of Public Proclamation No. 2, Headquarters Eastern Defense Command and First Army, dated September 7, 1943, an individual exclusion order prohibiting her from entering or remaining in the eastern military area, which included the City of Philadelphia, after the expiration of ten days from the date of service, to wit: on and after twelve o'clock midnight Thursday, May 6, 1943; that it further advised her that failure to comply with the same would subject her to forcible expulsion and criminal penalty as provided by Public Law No. 503, approved March 21, 1942, 18 U. S. C. A. 974; that the petitioner is a loyal citizen of the United States, deriving her citizenship through the naturalization of her husband, and has been a resident of the United States for thirty-two years; that for the past year thereof she has been lawfully conducting a restaurant located in an industrial and commercial area in the City of Philadelphia; that her son, George Schueller, twenty years of age, enlisted in the United States Navy and being a minor, it was necessary to obtain petitioner's consent to said enlistment, which she readily gave; that she endeavored to ascertain the cause of her exclusion but was unable to obtain any information thereof, being advised that the facts were confidential; that no right of appeal exists from the said exclusion order and that compliance therewith, will result in the taking

of her property as well as deprive her of her liberty without due process of law. The petition was later amended to make Lieutenant-General Drum a party defendant, and the prayer of the petition amended to request a declaratory judgment—in substance that the exclusion order was unconstitutional, as being violative of the due process clause. The petition was later amended to allege that the matter in controversy involved more than three thousand dollars (\$3,000), exclusive of interest and costs. The answer and amended answer denied that the controversy involved over three thousand dollars (\$3,000); that the petitioner failed to allege facts entitling her to declaratory or other relief; denied that the exclusion order was unlawful and averred that the petitioner was excluded because military necessity so required; that by virtue of the authority vested in the President of the United States, the petitioner was ordered excluded upon investigative reports and recommendations and upon the determination, that military necessity and fact required such action and that the exclusion order was made in good faith and without personal bias or prejudice and was not arbitrary, capricious or unreasonable.

A temporary restraining order was granted by the court prohibiting the defendant from taking any action with respect to the petitioner until the matter was legally determined. At the hearing the matter was considered in the nature of a bill in equity, and testimony was taken by both sides showing the whole course of the proceedings.

The government presented certain witnesses to testify to the fact that the petitioner voluntarily appeared in Philadelphia at the request of the military authorities and was examined concerning the range

of her activities, and especially her membership in certain German clubs; that she called no witnesses in her behalf, but merely answered the questions propounded to her by army officers, comprising a Hearing Board; that the questions asked of the petitioner were based on investigative reports of the Federal Bureau of Investigation; that the testimony of the petitioner coupled with the investigative reports formed a basis of the Hearing Board's decision to recommend exclusion of the petitioner; that the whole file comprising the investigative reports and testimony of the petitioner was submitted to a reviewing officer and some fifteen other reviewing officers and Board of Review, including the United States Attorney, a specially designated representative of the Department of Justice, the Chief of Staff and finally the Commanding General of the Eastern Defense Command and First Army, Lieutenant-General Drum, who entered the order excluding the petitioner from the eastern defense area. It was further testified that a recommendation not to exclude, at any of the stages heretofore indicated, prevented the case from going forward and resulted either in its termination or further investigation. Testimony was also offered by the Assistant Chief of Staff of the Eastern Defense Command as a military expert on matters of military intelligence. He stated that the Eastern Military area was a sensitive military area consisting of forty per cent (40%) of the population of the United States and an even larger percentage of the alien enemy population and of the population of enemy alien ancestry; that over forty per cent (40%) of war production and very large majority of war shipments, material and men to active theatres of military operations went through the ports of this

military area; that the area could be attacked by surface vessels and submarines as well as by aircraft.

Executive Order No. 9066 of the President of the United States was offered, providing in part as follows:

‘Authorizing the Secretary of War to Prescribe
Military Areas:

Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220 and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now, Therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the military commanders whom he may from time to time designate, whenever he or any designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate military commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate military commander may impose in his discretion. * * *’ There was introduced also in evidence by the government Public Proclamation No. 1, issued May 16, 1942, defining the areas of the Eastern Defense Command and First Army, which embraces Maine, New Hampshire, Vermont,

Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, Georgia, part of the State of Florida, and The District of Columbia, are established as the Eastern Defense Command under Lieutenant-General H. A. Drum. The functional subdivisions of the Eastern Military Area is subdivided into three Corps Areas; the Third Corps Area, with headquarters at Baltimore, Maryland, embraces Pennsylvania, Maryland and Virginia. Public Proclamation No. 2, dated September 7, 1942, was introduced in evidence in which paragraph 9A provides as follows: "Any person whose presence in the Eastern Military Area or any part or zone thereof, is deemed dangerous to the national defense by the Commanding General of the Eastern Defense Command and First Army will be ordered excluded from the military area or such part or zone thereof by the Commanding General, Eastern Defense Command and First Army. * * *

Congress by Act of March 21, 1942, provided: "That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under authority of an executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to fine or imprisonment, or both.

The petitioner denied any subversive activities on her part, said she was a loyal American citizen which

was corroborated by several other witnesses and explained her part in various German clubs in which she had been active. The petitioner was at no time confronted with witnesses who gave testimony against her, nor was she represented by counsel, nor was she at any time given any specification of the charges against her upon which an order of exclusion might be founded.

The contention of the petitioner is two-fold, (1) that there was an improper delegation of legislative power by the Congress to the Commander of the Eastern Military Area in authorizing him to impose the challenged regulation, and (2) that the exclusion order was violative of the due process clause of the Fifth Amendment of the Constitution. With respect to the first contention it must now be deemed settled, since *Hirabayashi v. United States*, June 21, 1943, that Congress in enacting the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066 of February 19, 1942, and that in so doing there was no improper delegation of legislative power. The question then resolves itself into one, not of congressional power to delegate to the President, the promulgation of the Executive Order, but rather whether acting in cooperation, Congress and the Executive, have constitutional authority, to impose the exclusion order here complained of. In other words, decision must be made as to whether Congress and the Executive together, could leave it to the designated military commander of this area, to appraise the relevant conditions then existing, and on the basis of that appraisal say, whether under all the circumstances, the time and place were appropriate for the exclusion order. The consideration of this question concerns itself, with whether or not the order was an appro-

priate means of carrying out the executive order for the "protection against sabotage and espionage" to national defense material, premises and utilities.

By virtue of his duties as Commander in Chief of the Army and Navy, it is the duty of the President and, together with Congress, jointly to see that war is successfully waged. This power is not only confined to actual engagements on fields of battle, but embraces every aspect of national defense including the protection of war materials as well as the members of the armed forces from injury and danger. In the furtherance of the successful prosecution of war, the President is properly vested with a discretion to determine whether the exigency of war requires that certain military restrictions be placed upon certain individuals. *Martin v. Mott*, 12 Wheat. 19. However as pointed out by Chief Justice Hughes in *Sterling v. Constantin*, 287 U. S. 378, 399: 'The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace.' However, it does not follow that all actions taken by the Executive are conclusive, for he further states, page 401: 'What are the allowable limits of military discretion and whether or not they have been overstepped in a particular case, are judicial questions.' As Chief Justice Taney stated in *Mitchell v. Harmony*, 13

How. 115, at 134, where private property in the actual theatre of war was taken to prevent its falling into the hands of the enemy: "But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for . . . Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.'

The position contended for by the government, is one of no ordinary magnitude and its exercise by military authorities engenders the jealousy of a free people. The statement of the court in *Ex parte Milligan*, 4 Wall. 2, 124, where a civilian was arrested by order of the Commanding General of an area in the State of Indiana for a war crime and tried by military tribunal and sentenced to death and where habeas corpus was allowed to obtain his release, seems to be very pertinent: 'The proposition is this: That in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States. If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval

of the Executive, substitute force for and to the exclusion of the laws, and punish all persons. as he thinks right and proper, without fixed or certain rules. The statement of this proposition shows its importance; for if true, republican government is a failure, and there is an end of liberty regulated by law.' As has been well said when the Executive 'further directs interference with liberty or property—measures normally beyond the scope of governmental power, which are lawful if at all only because an abnormal situation has made them necessary and appropriate—it is of the very essence of the rule of laws that the executive's *ipse dixit* is not of itself conclusive of the necessity.'

While it is true that there was testimony that the area in which the petitioner resided was a sensitive one, and the center of great industrial activities closely connected with the war, and that she was a member of a number of German societies, some of which the government held to be subversive and that she had written a letter to Hitler, calling his attention to certain needs that were in her opinion requisite for the people in a certain part of Germany, which she had observed as a result of her visit there in 1931, and which letter had ended with the greeting, 'Heil Hitler,' there was not shown such a danger as would warrant denial to the petitioner of her right to due process of law. The normal civilian life of the area was being pursued; commercial and industrial activities, their tempo heightened by a demand for greater production were in private ownership; the courts both federal and state were open and functioning as well as all the administrative and executive departments of government, and it could not be honestly said that ordinary law did not adequately

secure public safety and private rights. Accordingly, it would seem to me that Congress 'cannot authorize the executive to establish by conclusive proclamation the very thing which, upon familiar principles, would have been the subject of judicial scrutiny.'*

While it can be stated that the President must have a wide latitude of action when the characteristics of modern warfare are considered, mobility on land, surprise from the air and sea, treachery of sabotage and the preparation of fifth columns; and while it may be that the dictum in *Ex parte Milligan, supra*, that 'martial rule cannot arise from a threatened invasion,' must be reappraised in the light of man's ingenuity to wage modern war; and while I am not unmindful that the issuance of the proclamation by the Commander of the area is some evidence of the finding of the necessity for his assuming control of the functions of civil government, yet where there is a direct interference as here with one's liberty and property, conduct normally beyond the scope of government power, such action could only be justified, a constitutional guarantee of freedom can only be abridged, when the danger to the government is real, impending and imminent. The war power, distributed between Congress and the President, comprehends all that is requisite to wage war successfully. The proper adjustment between judicial power and administrative action, in time of war, is extremely delicate in nature and cannot admit of precise definition. Every circumstance and condition must weigh in the balance, and the true criterion will always give effect to the type and nature as well as the nearness or proximity of the danger to govern-

*Law of Martial Rule, Charles Fairman, 55 Harvard Law Review, 1272.

ment, as against the particular constitutional guaranty trespassed, whether it be of a high or low order. Suffice it to say, that the factual bases do not obtain here, which would warrant the abridgment of petitioner's constitutional rights.

A decree may be entered in conformity with this opinion."

It is our belief that the *Schueller* opinion is good law, and is a valid protection of a citizen's rights, yet leaves sufficient power in the military authorities to act within the law.

Again referring to the case of *Sterling v. Constantin*, 287 U. S. 378, at 403, we ask the indulgence of the court to permit us to repeat as follows:

"* * * The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power.' . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."

To these words we desire to add that if the military authorities are permitted by the courts to exercise the power they have assumed in this case, it will destroy our Constitution and all it has stood for since its adoption. We will then no longer be a government of law and order operating under our Constitution, but a government ruled by a dictator's decree—a decree the authority for which is delegated by the Chief Executive to some military com-

mander, permitting the military commander at his discretion, without trial or any semblance of legal right other than the decree of the Chief Executive, to seize any citizen the military commander may desire and forcibly eject such citizen from his home, destroy his business, and deprive him of every single right guaranteed to him by law and the Constitution of the United States.

If this court should permit such abuse of power and establish a precedent that the military authorities can legally exercise such an authority, who knows but what military officials, at their discretion, might make such an order against the Governor of this state, or even against the Justices of this court?

The only remedy left to this plaintiff-appellant as an American citizen, engaging in a reputable business within the State of California (and his pleadings show that only in the State of California and at his present business location could he carry on such business) was to appeal to this court for an injunction preventing the execution of said orders of the defendants-appellees from being carried out in derogation of the rights of this plaintiff-appellant promised and guaranteed to him as a citizen of the United States by the Constitution thereof.

Respectfully submitted,

LORRIN ANDREWS,

AVERY M. BLOUNT,

Attorneys for Plaintiff-Appellant.

APPENDIX.

Exhibit "A-1".

EXECUTIVE ORDER No. 9066, dated February 19, 1942,
7 F. R. 1407

AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS

Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now, Therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War, or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any

region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamation of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal Troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

Exhibit "A-2".

(Copy)

U. S. Exb. 4

WAR DEPARTMENT
Washington

EXTRACT

February 20, 1942

Commanding General
Western Defense Command and Fourth Army
Presidio of San Francisco, California

Dear General DeWitt:

By Executive Order, dated February 20, 1942, copy inclosed, the President authorized and directed me, through the Military Commander whom I designate, to prescribe military areas for the protection of vital installations against sabotage and espionage. The cited Executive Order also authorized and directed the administering authority to impose such restrictions upon the right to enter, remain in, or leave any such areas as may be appropriate to the requirements in each instance. Accordingly, I designate you as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command, including such changes in the prohibited and restricted areas heretofore designated by The Attorney General as you deem proper to prescribe.

Sincerely yours,

/s/ HENRY L. STIMSON
Secretary of War

Exhibit "A-3".

PUBLIC PROCLAMATION No. 1, 7 F. R. 2320
WAR DEPARTMENT

(Public Proclamation No. 1)

Headquarters Western Defense Command and Fourth
Army, Presidio of San Francisco, California.

MILITARY AREAS NOS. 1 AND 2 DESIGNATED AND
ESTABLISHED

March 2, 1942

To: The people within the States of Arizona, California,
Oregon, and Washington, and the Public Generally.

Whereas by virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command; and

Whereas, by Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or

the appropriate Military Commander may impose in his discretion; and

Whereas the Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas the Western Defense Command embraces the entire Pacific Coast of the United States which by its geographical location is particularly subject to attack, or attempted invasion by the armed forces of nations with which the United States is now at war; and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations;

Now, therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof as defined in Exhibit 1, hereto attached, and as generally shown on the map attached hereto and marked Exhibit 2.

2. Military Areas Nos. 1 and 2, as particularly described and generally shown hereinafter and in Exhibits 1 and 2 hereto, are hereby designated and established.

3. Within Military Areas Nos. 1 and 2 there are established Zone A-1, lying wholly within Military Area No. 1; Zones A-2 to A-99, inclusive, some of which are in Military Area No. 1, and the others in Military Area No. 2; and zone B comprising all that part of Military Area No. 1 not included within Zones A-1 to A-99, inclusive; all as more particularly described and defined and generally shown hereinafter and in Exhibits 1 and 2.

Military Area No. 2 comprises all that part of the States of Washington, Oregon, California and Arizona which is not included within Military Area No. 1, and is shown on the map (Exhibit 2) as an unshaded area.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and also from such of those zones herein described as Zones 2-A to A-99, inclusive, as are within Military Area No. 2.

Certain persons or classes of persons who are by subsequent proclamation excluded from the zones last above mentioned may be permitted, under certain regulations and restrictions to be hereafter prescribed, to enter upon or remain within Zone B.

The designation of Military Area 2 as such does not contemplate any prohibition or regulation or restriction except with respect to the zones established therein.

5. Any Japanese, German or Italian alien, or any person of Japanese Ancestry now resident in Military Area No. 1 who changes his place of habitual residence is hereby required to obtain and execute a "Change of Residence Notice" at any United States Post Office within the States of Washington, Oregon, California and Arizona. Such notice must be executed at any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The designation of prohibited and restricted areas within the Western Defense Command by the Attorney General of the United States under the Proclamation of December 7 and 8, 1941, and the instructions, rules and regulations prescribed by him with respect to such prohibited and restricted areas, are hereby adopted and continued in full force and effect.

The duty and responsibility of the Federal Bureau of Investigation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DEWITT,
Lieutenant General,
U. S. Army,
Commanding.

Confirmed: J. A. Ulio
Major General, the Adjutant General
(F. R. 42-2601; Filed March 25, 1942; 11:45 A. M.)

Exhibit "A-4".

PUBLIC PROCLAMATION No. 2, 7 F. R. 2405

WAR DEPARTMENT

(Public Proclamation No. 2)

Headquarters Western Defense Command and Fourth
Army Presidio of San Francisco, California

ESTABLISHMENT OF MILITARY AREAS 3, 4, 5, and 6

March 16, 1942.

Whereas by virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Utah and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command; and

Whereas by Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any persons to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

Whereas the Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

Whereas the Western Defense Command by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations:

Now, therefore, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones in addition to those established in Public Proclamation No. 1, this headquarters, dated March 2, 1942.

2. Pursuant to the determination and statement of military necessity in paragraph 1 hereof, there are hereby designated and established the following Military Areas:

Military Area No. 3, embracing the entire State of Idaho.

Military Area No. 4, embracing the entire State of Montana.

Military Area No. 5, embracing the entire State of Nevada.

Military Area No. 6, embracing the entire State of Utah.

3. Within Military Areas Nos. 1 and 2 as designated and established in Public Proclamation No. 1, above mentioned, and within Military Areas Nos. 3, 4, 5 and 6, as defined herein, there are hereby established, pursuant to paragraph 1 hereof, Zones A-100 to A-1033, inclusive, all as more particularly described in Exhibit 1 hereto attached, and as generally shown on the maps attached hereto and marked Exhibits 2, 3, 4, 5, 6, 7, 8 and 9.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from Zones A-100 to A-1033, inclusive.

The designation of Military Areas Nos. 3, 4, 5 and 6 as such does not contemplate any prohibition, regulation or restriction except as provided in paragraph 5 hereof.

5. Any Japanese, German or Italian alien, or any person of Japanese ancestry now resident in the States of the Western Defense Command, namely, Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, who changes his place of habitual residence is hereby required to obtain and execute a "Change of Residence Notice" at any United States Post Office within any of the states mentioned. Such notice must be executed at

any such Post Office not more than five nor less than one day prior to any such change of residence. Nothing contained herein shall be construed to affect the existing regulations of the U. S. Attorney General which require aliens of enemy nationalities to obtain travel permits from the U. S. Attorneys and to notify the Federal Bureau of Investigation and the Commissioner of Immigration of any change in permanent address.

6. The duty and responsibility of the Federal Bureau of Investigation with respect to the investigation of alleged acts of espionage and sabotage are not altered by this proclamation.

J. L. DEWITT
Lieutenant General,
U. S. Army, Commanding

Confirmed:

J. A. ULIO,
Major General,
The Adjutant General.

(F. R. Doc. 42-2673; Filed March 27, 1942; 10:29
A. M.)

Exhibit "A-5".

(Copy)

U. S. Exb. 3
July 15, 1942

Dear General DeWitt:—

I refer to Executive Order of the President No. 9066, dated February 19, 1942, and to your designation as a Military Commander for the Territory of the United States embraced within Western Defense Command to carry out the duties and responsibilities imposed by the mentioned Executive Order and authorizing and empowering you to take whatever steps may be necessary to discharge these duties and responsibilities.

In order effectively to accomplish the exclusion from Military Areas of the Western Defense Command and from other similar areas, of persons whose presence therein is deemed dangerous to the National Security, you are authorized and empowered within the scope of the cited Executive Order, to prohibit any or all of such persons, that is, persons who have been excluded by you from any military area of the Western Defense Command, from entering, being in or remaining in any other Military Areas of the United States prescribed pursuant to said Executive Order, including the Eastern Military Area in Eastern Defense Command and the Military Areas of the Southern Defense Command.

Yours very truly,

HENRY L. STIMSON

Secretary of War

Lieutenant General John L. DeWitt, Commanding General,
Western Defense Command and Fourth Army
Presidio of San Francisco, California

Certified True Copy:

/s/ Hugh T. Fullerton
Hugh T. Fullerton
Major, A. G. D.,
Assistant Adjutant General.

No. 10514

IN THE

7
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KENNETH ALEXANDER,

Appellant,

vs.

LT. GEN. JOHN L. DEWITT, Commanding General of the
United States Army of the Western Defense Command
and Fourth Army, and R. B. HOOD, Special Agent in
Charge of the Federal Bureau of Investigation of the
United States Department of Justice located at Los
Angeles,

Appellees.

Upon Appeal from the District Court of the United States for the
Southern District of California,

BRIEF FOR THE APPELLEES.

CHARLES H. CARR,

United States Attorney.

JOHN L. BURLING,

NANETTE DEMBITZ,

ELMER MILLION,

*Attorneys, War Division,
Department of Justice,*

United States Postoffice and
Courthouse Bldg., Los Angeles (12),

Attorneys for Appellees.

FILED

NOV 26 1943

PAUL P. O'BRIEN,

CLERK

TOPICAL INDEX.

	PAGE
Jurisdiction	1
Orders, proclamations and statutes.....	2
Statement of the case.....	5
Question presented	7
Argument	8

I.

The complaint for injunctive relief was properly dismissed by the court below for failure to state a cause of action in that it did not sufficiently allege facts showing an imminent threat of irreparable injury.....	8
1. Assuming that the complaint adequately alleges an imminent threat of criminal prosecution, it does not allege facts showing that such criminal prosecution would cause irreparable damage, and thus it does not allege facts furnishing a basis for injunctive relief.....	9
2. The complaint does not clearly allege an imminent threat of enforcement of the Exclusion Order through any means other than criminal prosecution.....	11

II.

If this court, however, should find that the complaint did sufficiently allege a threat of physical expulsion, then the case should be remanded for further proceedings.....	15
Conclusion	17

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Beal v. Missouri Pacific R. Co., 312 U. S. 45.....	10, 11
Boise Artesian Water Co. v. Boise City, 213 U. S. 276.....	11, 13
Boynton v. Fox West Coast Theatres Corp., 60 F. (2d) 851 (C. C. A. 10th, 1932).....	11
Cavanaugh v. Looney, 248 U. S. 453.....	11
Cline v. Frink Dairy Co., 274 U. S. 445.....	10, 11
Connecticut v. Massachusetts, 282 U. S. 660.....	13
Cruickshank v. Bidwell, 176 U. S. 73.....	13
Davis & Farnum Mfg. Co. v. Los Angeles, 189 U. S. 207.....	10, 11
E. I. Dupont de Nemours & Co. v. Boland, 85 F. (2d) 12 (C. C. A. 2d, 1936).....	13
Haldeman-Julius Publishing Co. v. Kiely, 63 F. (2d) 814 (C. C. A. 2d, 1933).....	14
Hegeman Farms Corp. v. Baldwin, 293 U. S. 163.....	13
Ithaca Trust Co. v. United States, 279 U. S. 151.....	14
Levering & G. Co. v. Morrin, 289 U. S. 103.....	14
McNutt v. General Motors Acceptance Corp., 298 U. S. 178.....	16
Milliken v. Stone, 16 F. (2d) 981 (C. C. A. 2d, 1927).....	13
Mosher v. Phoenix, 287 U. S. 29.....	14
New Jersey v. Sargent, 269 U. S. 328.....	13
New York v. Illinois, 274 U. S. 488.....	13
Southern Pacific Co. v. Conway, 115 F. (2d) 746 (C. C. A. 9th, 1940)	13
Spielman Motor Co. v. Dodge, 295 U. S. 89.....	11
Tenant v. Kuhlemeier, 142 Iowa 241, 120 N. W. 689 (1909).....	12
Trustees System Co. of Pennsylvania v. Payne, 65 F. (2d) 103 (C. C. A. 3rd, 1933).....	14
United States v. Gordin, 287 Fed. 565 (D. Ohio, 1922).....	12

United States v. Marine Engineers Ben. Assn. No. 38, 277 Fed. 830 (W. D. Wash. N. D., 1921).....	13
Universal Rim Co. v. General Motors Corp., 31 F. (2d) 969 (C. C. A. 6th, 1929).....	13
Washingtonian Home of Chicago v. Chicago, 281 Ill. 110, 117 N. E. 737 (1917).....	12
Watson v. Buck, 313 U. S. 387.....	10, 11
Widener v. Sharp, 109 Neb. 766, 192 N. W. 726 (1923).....	12

MISCELLANEOUS.

Black's Law Dictionary, 3rd Ed., 1933.....	12
High, Injunctions (4th Ed., 1905), Sec. 34.....	14
Webster's New International Dictionary, 2nd Ed.....	12

STATUTES, ORDERS AND PROCLAMATIONS.

Act of March 21, 1942 (Public Law 503, 77th Cong., 2d Sess., c. 191, 56 Stat. 173, U. S. C. 97a).....	3, 10
Judicial Code, Sec. 24, as amended (U. S. C., Title 28, Sec. 41(1))	2
Judicial Code, Sec. 128, as amended (U. S. C., Title 28, Sec. 225)	2
Executive Order No. 9066, dated February 19, 1942 (7 F. R. 1407)	2, 3, 4, 12, 13
Public Proclamation No. 1, issued by Lt. Gen. DeWitt, March 2, 1942 (7 F. R. 2320).....	3, 4
Public Proclamation No. 2, issued by Lt. Gen. DeWitt, March 16, 1942 (7 F. R. 2405).....	3, 4
Federal Rules of Civil Procedure, Rule 10 (U. S. C., Title 28, foli. Sec. 723(c)).....	5
Judicial Code, Sec. 24(1).....	16

No. 10514

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

KENNETH ALEXANDER,

Appellant,

vs.

LT. GEN. JOHN L. DEWITT, Commanding General of the United States Army of the Western Defense Command and Fourth Army, and R. B. Hood, Special Agent in Charge of the Federal Bureau of Investigation of the United States Department of Justice located at Los Angeles,

Appellees.

GOVERNMENT'S BRIEF.

Jurisdiction.

This is an appeal from a judgment of the United States District Court for the Southern District of California, Central Division, entered June 15, 1943, which denied appellant's motion for an injunction *pendente lite* and which granted a motion of the appellees that the appellant's complaint be dismissed on the ground that it did not state facts sufficient to constitute a cause of action [R. 35-46].¹ The jurisdiction of the District Court was in-

¹The symbol "R." will be used to designate the pages of the transcript of record, and the symbol "S. R." will be used to designate the pages of the supplemental transcript of record.

voked under Section 24, as amended, of the Judicial Code (United States Code, Title 28, Sec. 41(1)) [R. 2-3, 12-17]. The jurisdiction of this Court is invoked under Section 128, as amended, of the Judicial Code (United States Code, Title 28, Sec. 225).

Orders, Proclamations and Statutes.

By Executive Order No. 9066, dated February 19, 1942 (7 F. R. 1407) in so far as here relevant, the President authorized and directed—

“* * *, the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.”

The Executive Order further authorized and directed—

“* * *the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal Troops and other Federal Agencies, with authority to accept assistance of state and local agencies.”

Under date of February 20, 1942 the Secretary of War, acting pursuant to Executive Order No. 9066, designated

Lt. Gen. DeWitt as the Military Commander to carry out the duties and responsibilities imposed by the Executive Order for that portion of the United States embraced in the Western Defense Command [Government's Exhibit 4; reprinted on p. 4 of the appendix to the appellant's brief]. Acting under authority of his designation by the Secretary of War and under authority of Executive Order No. 9066, Lt. Gen. DeWitt issued Public Proclamations Nos. 1 and 2 on March 2 and March 16, 1942, respectively, which established military areas comprising portions of specified states within the Western Defense Command (7 F. R. 2320; 7 F. R. 2405).

The Act of March 21, 1942 (Public Law 503, 77th Cong., 2d Sess., c. 191, 56 Stat. 173, U. S. C. 97a) reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of war or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both, for each offense.

Approved, March 21, 1942.

In an order entitled, "Individual Exclusion Order No. 1K-7," dated April 14, 1943, addressed to the appellant, Lt. Gen. DeWitt stated that "Under authority of Executive Order 9066, February 19, 1942, and letter of the Secretary of War, February 20, 1942, and pursuant to a determination that the present action is dictated by military necessity," the appellant was prohibited, after the expiration of ten days from the date of receipt of the order, from "being in, remaining in, or entering into" specified military areas established by General DeWitt's Public Proclamations Nos. 1 and 2, which areas included within them appellant's place of residence, and specified military areas established by other Military Commanders pursuant to Executive Order No. 9066. In addition to these provisions and the provisions with respect to the appellant's duty to make reports, which are not here relevant, the order recited:

"Failure to comply with the foregoing will subject you to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled, 'An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones.'" [R. 26-28.]

Statement of the Case.

The appellant's complaint, which prayed for a temporary restraining order, a preliminary and a permanent¹ injunction, and for damages [R. 17-18], alleged, in summary, in addition to jurisdictional allegations, that the plaintiff was and has been since 1915 a citizen of the United States; that plaintiff had performed specified acts indicative of his loyalty and attachment to the United States; and that he had at all times been a law-abiding citizen [R. 2-6, 11-12]. The complaint further alleged that the appellant received a notice on February 27, 1943 advising him that a Board of Officers had been appointed by the Commanding General of the Western Defense Command to consider whether military necessity required the appellant's exclusion from certain military areas, that the appellant could, if he wished, appear before such Board of Officers on March 11, 1943, and that he would then be informed of the general nature and scope of the inquiry and be afforded an opportunity to present evidence in his own behalf; that appellant appeared before the Board that the Board made various inquiries into appellant's activities; that individual exclusion order 1K-7 prohibiting appellant's presence in certain military

¹The complaint has been treated in this brief as a complaint for preliminary and permanent injunctive relief, since it includes a prayer for both a temporary and permanent injunction, even though the caption does not state that it is a complaint for a permanent injunction [R. 2]. Under Rule 10 of the Federal Rules of Civil Procedure (U. S. C., Title 28. foll. Sec. 723(c)) it is unnecessary in any event for the caption to state more than the word "complaint." Thus the language in the caption should not be considered to limit the scope of the complaint.

areas including his place of residence was thereafter served upon him; and that a petition to Lt. Gen. DeWitt with respect to the recession of the order was thereafter denied [R. 7-11, 23-25]. Further, the appellant alleged that he was not a member of the military forces of the United States nor subject to military law; that no martial law had been declared within the continental United States; that the Courts within the United States have continued to be open; that the procedure by which the individual exclusion order was issued was deficient in specified respects and that it was arbitrarily and capriciously issued and without the support of evidence; and that it was not warranted by military or any other necessity [R. 12-14]. The complaint further alleged that the appellees had enforced and were threatening to continue to enforce the order and that such enforcement had and would cause irreparable damage to the appellant as well as the abridgment of specified constitutional rights of the appellant [R. 14-15]. The appellant also made various allegations as a separate cause of action for damages.

Annexed to the complaint was a copy of an order entitled, "Individual Exclusion Order No. IK-7," in which appellee DeWitt ordered the plaintiff excluded from specified military areas. The order contained no threat or statement as to any intended manner of enforcement of this order other than the statement quoted on page 3 above, to the effect that failure to comply with the order would subject the plaintiff to criminal penalties.

A hearing was held on May 25, 1943 on appellant's motion for an injunction *pendente lite* [R. 29] and on appellees' motion to deny the application for such injunc-

tion, to strike certain portions of the complaint, and to dismiss the complaint for failure to state a claim upon which relief can be granted [R. 30-31]. The appellees' motion to strike was denied in part and granted in part; the cause of action for damages was stricken on the appellant's motion; the appellant's motion for permanent injunctive relief was denied; and the motion of appellees to dismiss the complaint was granted. The ground of decision of the District Court was that a criminal prosecution would not be enjoined and the complaint failed sufficiently to allege that the appellee DeWitt intended to carry out his order in any other manner, and, therefore, failed to allege an imminent threat of enjoinable injury [R. 33-37, S. R.].¹

Question Presented.

The question presented is whether the Court below correctly determined that the appellant's complaint for injunction failed to state a cause of action on the ground that a criminal prosecution is not enjoinable under the circumstances of this case, and on the ground that the complaint did not contain clear and sufficient allegations with respect to a threat of physical expulsion from the Western Military Areas.

¹Although it is not in the record, appellees, for whatever relevance, if any, it may have, state that on September 6, 1943 appellant was expelled from the Western Military Areas.

ARGUMENT.

POINT I.

The Complaint for Injunctive Relief Was Properly Dismissed by the Court Below for Failure to State a Cause of Action in That it Did Not Sufficiently Allege Facts Showing an Imminent Threat of Irreparable Injury.

It is familiar law that the two fundamental criteria of whether injunctive relief is proper are whether there is an imminent threat of action by the parties against whom the injunction is sought and whether irreparable damage would occur to the plaintiff if such threatened act were committed. Accordingly, a complaint does not state a cause of action for an injunction, unless it adequately alleges an imminent threat of action which would cause irreparable damage. Furthermore, the particular respects in which the plaintiff is imminently threatened with irreparable injury must be alleged. The familiar rule of pleading that mere statements of conclusions of law are insufficient and that facts must be alleged in support of the essential grounds of a cause of action is applied with strictness in injunction proceedings because of the extraordinary nature of the remedy. (See cases cited, *infra*. p. 10.)

In the instant case the only allegations which could, with the greatest latitude, be construed to pertain to an imminent threat of action injurious to the plaintiff were those contained in Paragraph 13 of the complaint, reading:

“The defendants have, since April 14, 1943, enforced and are enforcing said orders at the present time, and they have threatened, and they intend to,

carry out and enforce said orders and each of them; and will, unless restrained from so doing by order of this Court, carry out and execute each of said orders.” [R. 14.]

The only allegation bearing on the irreparability of the injury to be suffered as a result of such enforcement is contained in Paragraph 14, reading:

“The plaintiff has already suffered irreparable injury by the enforcement by the defendants of the orders aforesaid, and will continue to suffer irreparable injury by virtue of the enforcement of said orders, unless said enforcement is restrained by orders of this Court. Plaintiff does not have an adequate remedy at law.” [R. 16.]

Neither of these paragraphs of the complaint, with all assistance that can be obtained for them from the rest of the complaint, satisfy the standard described above with respect to the sufficiency of a complaint for injunctive relief.

1. **Assuming That the Complaint Adequately Alleges an Imminent Threat of Criminal Prosecution, it Does Not Allege Facts Showing That Such Criminal Prosecution Would Cause Irreparable Damage, and Thus it Does Not Allege Facts Furnishing a Basis for Injunctive Relief.**

At the outset it must be noted that the Civilian Exclusion Order, which was annexed as Exhibit “F” to the appellant’s complaint, did not state any means by which it would be enforced other than through the criminal pen-

alties provided by the Act of March 21, 1942, set forth, *supra*, p. 4 [R. 28]. Likewise, the notice of the hearing before the Board of Officers, annexed to the complaint as Exhibit "E," refers only to this method of enforcement [R. 7-8, 23-25]. We will assume *arguendo* that Paragraph 13, when read in conjunction with the annexed Exclusion Order and Notice of Hearing, sufficiently alleges an imminent threat of criminal prosecution for failure to comply with the Order, even though the complaint lacks sufficient definiteness in this respect. It is established, however, that a threat of criminal prosecution does not in itself constitute a threat of irreparable damage. The fact that the plaintiff must risk conviction in order to test the constitutionality of the order, and the fact that he must obey what he considers to be an unconstitutional order unless he is willing to assume this risk, is a fact which is a concomitant of every suit for an injunction to prevent the enforcement of a criminal statute which is alleged to be unconstitutional; and the existence of such facts do not entitle the plaintiff to injunctive relief. (See *Beal v. Missouri Pacific R. Co.*, 312 U. S. 45, 51.) To state a cause of action for injunctive relief based on the threat of criminal prosecution, the complaint must allege that the plaintiff is threatened with multiple prosecutions (See *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207, 219; *Watson v. Buck*, 313 U. S. 387, 400; *Beal v. Missouri Pacific R. Co.*, *supra*, at p. 50; *Cline v. Frink Dairy Co.*, 274 U. S. 445,

451), or with the necessity for defending in multiple suits of any type (See *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 283); or that such threat will cause irreparable damage to his property (See *Cline v. Frink Dairy Co.*, *supra*; *Cavanagh v. Looney*, 248 U. S. 453, 456; *Davis & Farnum Mfg. Co. v. Los Angeles*, *supra*); or in some other respects will cause him irreparable damage arising from extraordinary circumstances which take his case out of the usual rule that equity will not enjoin a criminal prosecution. (See *Watson v. Buck*, *supra*; *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89, 95; *Boyn-ton v. Fox West Coast Theatres Corp.*, 60 F. (2d) 851, 854; *Beal v. Missouri Pacific R. Co.*, *supra*.) There can be no doubt that there are no allegations in the complaint of any such extraordinary circumstances, and that, even construing it most liberally, the complaint does not indicate that any such circumstances exist.

2. The Complaint Does Not Clearly Allege an Imminent Threat of Enforcement of the Exclusion Order Through Any Means Other Than Criminal Prosecution.

The complaint cannot be construed to allege a threat of enforcement by any means other than criminal prosecution. As noted above, the only allegation of the complaint with respect to enforcement is that the appellees are threatening to enforce "the orders," referring to the Civilian Exclusion Order and the Notice of Hearing, which stated that appellant's exclusion was being considered; neither the Order nor the Notice refers to any method of en-

forcement other than criminal prosecution.¹ There is no allegation in the complaint that the appellees have threatened or have done any act looking toward any other type of enforcement.² While it is true that under Executive Order No. 9066 appellee DeWitt has the power to enforce the Exclusion Order by forcible expulsion of the appellant, there is no allegation in the complaint pertaining to this power or to the fact that the appellee intends to employ it. It is conceded that the pleadings can be construed in the light of matters of which the Court may take judicial notice, and that this category of matters includes Executive Order No. 9066. Nevertheless,

¹A search of the complaint for any indication that it should be construed to allege a threat of forcible expulsion rather than, or in addition to, a threat of criminal prosecution, reveals only one possibility; and we believe, that one to be without merit. While the allegation with regard to the threat of injury is that there is a threat of enforcement by the appellees, and while it is true that neither appellee could himself institute a criminal prosecution whereas the appellee DeWitt could himself institute forcible expulsion, nevertheless the appellees could "enforce" the Civilian Exclusion Order in the sense in which the term "enforce" is generally used. A common usage of the term "enforce" is in the sense of "cause to take effect." (Black's Law Dictionary, 3rd Ed., 1933; Webster's New International Dictionary, 2nd Ed.) See *United States v. Gordin*, 287 Fed. 565, 571 (D. Ohio, 1922), which involved a statute appropriating funds "to enable the Bureau . . . to enforce the government regulations," where the Bureau enforced the regulations by having a suit brought by the United States Attorney. See, also, *Widener v. Sharp*, 109 Neb. 766, 772; 192 N. W. 726, 728 (1923), where the Court said that "The word 'enforce' does not necessarily imply actual force or coercion, but may mean . . . to cause to have force or effect, or to be executed; to put in execution; to cause to take effect." In the instant case it is clear that the appellees could enforce the order by attempting to cause the institution of criminal prosecution and that this was the method indicated by the orders annexed to the complaint. The fact that the term "execute" is also used in the paragraph alleging the threat of enforcement cannot be regarded as significant, since this word is often used synonymously with "enforce." (Webster's New International Dictionary, 2d Ed.; *Tennant v. Kuhlemeier*, 142 Iowa 241, 245; 120 N. W. 689, 693 (1909) (dissenting opinion).)

²Compare *Washingtonian Home of Chicago v. Chicago*, 281 Ill. 110, 117 N. E. 737 (1917), where the Court held that a bill for an injunction which alleged that the defendant threatened prosecution for violation of a building ordinance and alleged that the defendant threatened to prevent the plaintiff from using the building in issue should not be construed as alleging that the plaintiff was threatened with any method of enforcement of the ordinance (such as forcible ejection) other than prosecution.

judicial notice of the Executive Order cannot in any way affect the deficiency in the complaint in so far as it fails to allege that any act had been done by the appellees indicating an intent to enforce the order through forcible expulsion. The mere fact that appellee DeWitt possessed the power to effect such forcible expulsion does not indicate that such expulsion was threatened. (See *Southern Pacific Co. v. Conway*, 115 F. (2d) 746, 749 (C. C. A. 9th, 1940).) At the most the existence of this power indicates the mere possibility that forcible expulsion might be undertaken, and judicial notice of Executive Order No. 9066 may thus be considered to supply an allegation of such a possibility. However, it is well established that an allegation of such a possibility is insufficient to establish a cause of action for an injunction; the threat must be imminent—not conjectural, distant, or speculative. (See *New Jersey v. Sargent*, 269 U. S. 328, 338-339; *New York v. Illinois*, 274 U. S. 488, 489; *Connecticut v. Massachusetts*, 282 U. S. 660, 674.)

As noted above, moreover, the respects in which the plaintiff is imminently threatened with irreparable damage must be alleged with specificity in a complaint for an injunction in order for it to be upheld as against a motion to dismiss. (See *Boise Artesian Water Co. v. Boise City*, 213 U. S. 276, 285. See also, *E. I. DuPont de Nemours & Co. v. Boland*, 85 F. (2d) 12, 15 (C. C. A. 2d, 1936); *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 170; *United States v. Marine Engineers Ben. Assn. No. 38*, 277 Fed. 830, 834 (W. D. Wash., N. D., 1921); *Milliken v. Stone*, 16 F. (2d) 981, 984 (C. C. A. 2d, 1927); *Cruickshank v. Bidwell*, 176 U. S. 73, 81; *Universal Rim Co. v. General Motors Corp.*, 31 F. (2d)

969, 970(C. C. A. 6th, 1929); *High, Injunctions* (4th Ed., 1905) Sec. 34; *Haldeman-Julius Publishing Co. v. Kiely*, 63 F. (2d) 814, 815 (C. C. A. 2d, 1933).) Measured by this standard it is clear that the court below was correct in its conclusion that the complaint did not sufficiently allege an imminent threat of forcible expulsion.

There is, of course, no doubt that the sufficiency of the complaint must be tested by its allegations, and not by unpleaded facts which do, or may in the future, exist. (See *Mosher v. Phoenix*, 287 U. S. 29, 30; *Levering & G. Co. v. Morrin*, 289 U. S. 103, 105; *Trustees System Co. of Pennsylvania v. Payne*, 65 F. (2d) 103, 104 (C. C. A. 3d, 1933).) Thus the fact that on September 6, 1943, appellant was expelled from the Western Military Areas cannot be considered in passing on the sufficiency of the complaint. Compare Holmes, J., in *Ithaca Trust Co. v. United States*, 279 U. S. 151, 155:

“Tempting as it is to correct uncertain probabilities by the now certain fact, we are of the opinion that it can not be done”

* * * * *

Since the complaint did not allege facts showing that the plaintiff would suffer irreparable damage as a result of criminal prosecution for failure to obey the Exclusion Order and since the complaint did not adequately allege an imminent threat of any other type of enforcement of the Order, the complaint failed to allege an imminent threat of irreparable injury and thus it did not state a cause of action for injunctive relief.

POINT II.

If This Court, However, Should Find That the Complaint Did Sufficiently Allege a Threat of Physical Expulsion, Then the Case Should be Remanded for Further Proceedings.

It cannot be doubted that the sole issue considered by the District Court was whether the complaint sufficiently alleged that the defendant threatened physical expulsion, or whether it alleged merely that the defendant threatened to institute criminal prosecution. The defendants' motion, in so far as here relevant, was that the complaint be dismissed for failure to state a claim as to defendants upon which relief could be granted [S. R. 82, 83]. The course of the proceedings in the District Court on motion to dismiss makes it abundantly clear that the District Court did not determine the constitutionality of the exclusion order, or whether, if forcible expulsion had been sufficiently alleged,¹ a temporary injunction would have issued. In fact, the court expressly states that this question was not before it, and indicates that had it been before it, a

¹The Court repeatedly indicated that it construed the pleading as alleging solely a threat of criminal prosecution. At S. R. 93, 94, there is the following colloquy:

"Mr. Wirin: May I just inquire, is it your Honor's interpretation or construction of the pleadings before the Court and the statements made by counsel for the defendants that there is no threat of or immediate danger of any physical removal of the plaintiff from this area?"

The Court: That is the way it appears to me now.

Mr. Wirin: That is the only relief we are asking. Now, if there were that assurance, by the judicial requirements of the state of the pleadings and statements of counsel, then we agree with the Court there is no warrant for issuing any injunctive relief.

The Court: I don't think your complaint states a cause of action for that reason. I don't think there is anything here. If there was

temporary order might have been granted [S. R. 83, 85, 86, 87, 89, 93, 94].

Nor did the Court pass upon other possible defenses to the maintenance of these proceedings that might have been raised either by the defendants or the Court itself, *sua sponte*, such as the absence of Federal jurisdiction under Section 24(1) of the Judicial Code. (*Cf. McNutt v. General Motors Acceptance Corp.*, 298 U. S. 178.)

In these circumstances, if this Court should conclude that the District Court granted the motion to dismiss upon an erroneous ground, the case should be remanded to the District Court for further proceedings so that the defendants may present such other defenses as may be available against the maintenance of these proceedings or upon the merits.

a threat that he was going to physically remove this plaintiff from this jurisdiction or from his home or from a Military area, then I think you would have something that would now be before the Court, but all he is threatening to do is to enforce the law, the Act of Congress; that 'if you don't do this,' why, then it is up to some other department of the Government.

Mr. Wirin: But there is the allegation in the complaint, after a recital of the order and its terms, that the defendants threaten to enforce the order.

The Court: Well, I think there has to be more than that, Mr. Wirin, I mean, just a mere conclusion that they threatened to enforce the order. The manner of enforcement is indicated.

Mr. Wirin: But it is not an exclusive manner.

The Court: If you had alleged that he had seen General DeWitt or Captain So-and-so, or Major This, or somebody else, and they had told him, 'We are going to physically remove you from the District,' then there might be something further; but here is a mere allegation of threat.

So I think that the motion to grant the injunction *pendente lite* will be denied. As a matter of fact, I think that I am compelled under my view to grant the motion to dismiss until there is some physical threat shown, and the motion to dismiss will be granted."

See also, S. R. 71, 73, 88, 89, 90.

Conclusion.

The judgment of the District Court should be affirmed on the ground that the complaint failed to allege a threat of any action on the part of the defendant other than the institution of criminal proceedings and, therefore, failed to state a cause of action. If this Court should determine otherwise, however, then the case should be remanded to the District Court for further proceedings.

Respectfully submitted,

CHARLES H. CARR,

United States Attorney.

JOHN L. BURLING,

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Attorneys, War Division.

Attorneys for Appellees.

No. 10597

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRED J. ROGERS, MIRON RUSTIGIAN and
HAGOOHI RUSTIGIAN,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION, a Corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Northern Division

FILED

NOV 29 1943

PAUL P. O'BRIEN,
CLERK

No. 10597

United States
Circuit Court of Appeals

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vs.

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Ann. N. Y. Acad. Sci. 1957, 10: 1-10
New York

1957, 10: 1-10
New York

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Adjudication, Order of Reference and Temporary Restraining Order	8
Affidavit of Matt Goldstein	96
Affidavit of Mailing Notice	31
Amended Petition Under Section 75 of the Bankruptcy Act	6
Appeal:	
Bond for Costs on	90
Certificate of Clerk to Transcript of Record on	100
Designation of Contents of Record on (DC)	97
Notice of	89
Order Extending Time to File Record and Docket	95
Statement of Points on which Appellants Intend to Rely on Appeal and Designation of Parts of Record to be Included in Record on	103
Approval of Debtor's Petition and Order of Reference	4

Index	Page
Bond for Costs on Appeal	90
Certificate of Clerk to Transcript of Record on Appeal	100
Certificate of Referee on Review	10
Debtor's Amended Petition Under Section 75 of the Bankruptcy Act	6
Debtor's Petition Under Section 75 of the Bankruptcy Act	2
Designation of Contents of Record on Appeal (DC)	97
Designation of Record, Statement of Points and (CCA)	103
Names and Addresses of Attorneys of Record..	1
Notice of Appeal	89
Notice of Filing of Notice of Appeal.....	94
Notice of Hearing Petition to Review.....	80
Objections of Bank of America N. T. & S. A...	26
Objections of Security-First National Bank of Los Angeles	18
Opinion on Petition for Review	83
Order Extending Time to File Record on Ap- peal	95
Order on Petition for Review	88
Order Permitting the Payment of Moneys on Account of Attorney Fees	30

Index	Page
Petition for Order Permitting the Payment of Moneys for Attorney Fees	14
Petition to Review Orders of Conciliation Com- missioner	32
Petition Under Section 75 of the Bankruptcy Act, Debtor's	2
Amended	6
Referee's Certificate on Review	10
Statement of Points on which Appellants In- tend to Rely and Designation of Record on Appeal (CCA)	103
Transcript of Testimony	38
Witnesses:	
Goldstein, Matt	
—direct	38
—cross	44
—recalled, direct	64
Peckinpah, David E.	
—direct	48
—cross	54
—recalled, direct	61
Rogers, Fred J.	
—direct	68

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In the District Court of the United States, for the
Southern District of California, Northern
Division

No.....

In the Matter of

MIRON RUSTIGIAN and HAGOOHI RUS-
TIGIAN,

Debtor

DEBTORS' PETITION IN PROCEEDINGS
UNDER SECTION 75 OF THE BANK-
RUPTCY ACT

To the Honorable Wm. P. James, Judge of the
United States District Court for the Southern
District of California:

The petition of Miron Rustigian and Hagoochi
Rustigian, of Fresno, California, whose addresses
are 2535 McKenzie Avenue, Fresno, California, oc-
cupation farmers, Respectfully Represents:

That they are personally bonafide engaged pri-
marily in farming operations (or that the principal
part of their income is derived from farming op-
erations) as follows:

They have approximately one hundred (100)
acres of land devoted principally to the growing of
grape vines, located in the County of Madera, State
of California; that petitioners herein own said
interest in said real property as community prop-
erty; that petitioners are husband and wife; that
each and all of the assets and liabilities referred to
herein are of a community nature and that there is

no separate property or liability involved in the within proceedings; that such farming operations occur in the County of Madera within said judicial district; that they are insolvent (or unable to meet their debts as they mature); and that they desire to effect a composition or extension of the time to pay their debts under section 75 of the Bankruptcy Act.

That the Schedule hereto annexed marked "A" and verified by your petitioners' oath, contains a full and true statement of all their debts, and (so far as it is possible to ascertain) the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the Schedule hereto annexed marked "B" and verified by your petitioners' oath, contains an accurate inventory of all their property, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

Wherefore, your petitioners pray that their petition may be approved by the Court and proceedings had in accordance with the provisions of said Section.

MIRON RUSTIGIAN
HAGOOHI RUSTIGIAN

FRED J. ROGERS

Attorney for Petitioners
813-14-15 Pacific Southwest Bldg.,
Fresno, California.

United States of America,
Southern District of California,—ss.

We, Miron Rustigian and Hagoohi Rustigian, the petitioning debtors mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of our knowledge, information and belief.

MIRON RUSTIGIAN
HAGOOHI RUSTIGIAN

Subscribed and sworn to before me this 6th day of May, 1940.

FRED J. ROGERS
Notary Public in and for the County of Fresno,
State of California.

[Endorsed]: Filed May 18, 1940. [2]

[Title of District Court and Cause.]

No. 5465 Bkey.

APPROVAL OF DEBTOR'S PETITION

and Order of Reference

(under Section 75 Bankruptcy Act)

At Los Angeles, in said District, on May 18, 1940, before the said Court the petition of Miron Rustigian and Hagoohi Rustigian, husband and wife, that they desire to effect a composition or an extension of time to pay their debts, and such other

relief as may be allowed under the Act of March 3, 1933, and within the true intent and meaning of all the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to John D. Boyle, Esq., one of the Conciliation Commissioners in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said Miron Rustigian and Hagoohi Rustigian, husband and wife, shall attend before said Conciliation Commissioner on May 25, 1940, and at such time as said Conciliation Commissioner shall designate, at his office in Madera California, and shall submit to such orders as may be made by said Conciliation Commissioner or by this Court relating to said matter.

Witness, the Honorable Wm. P. James Judge of said Court, and the seal thereof, at Los Angeles, in said District, on May 18, 1940.

[Seal] R. S. ZIMMERMAN, Clerk

By F. BETZ

Deputy Clerk

[Endorsed]: Filed May 18, 1940. [4]

[Title of District Court and Cause.]

DEBTORS' AMENDED PETITION IN PROCEEDINGS UNDER SECTION 75 OF THE UNITED STATES BANKRUPTCY ACT AS AMENDED

To the Honorable Judges of the District Court of the United States, in and for the Southern District of California:

The amended petition of Miron Rustigian and Hagoochi Rustigian, of the County of Fresno, State and Southern District of California, respectfully shows:

That prior hereto the within debtors filed a petition in the above entitled Court under the provisions of Section 75 of the United States Bankruptcy Act as amended, praying for a composition or extension of time in which to pay their debts. That thereafter by an Order duly made by the above entitled Court, the matter was referred to John D. Boyle, Esq., the duly appointed, qualified and acting Conciliation Commissioner; that said Conciliation Commissioner after due proceedings had, held a meeting of debtors' creditors; that at said meeting they tendered an offer of composition and said creditors refused to accept the same and none of their creditors would accept a proposal or offer of composition or extension.

That your petitioners are entitled to be adjudicated bankrupts in accordance with the provisions of said Section 75 of the United States Bankruptcy Act as amended, and petitioners do hereby petition

and request that all of their property, wherever located, whether pledged, encumbered or unencumbered, be appraised, and that their unencumbered exemptions and unencumbered interest or equity in their exemptions as prescribed by State Law be set [5] aside to them, and that they be allowed to retain possession, under the supervision and control of the Court, of all of the remainder of their property including encumbered exemptions.

Wherefore, your petitioners pray that they may be adjudicated bankrupts in accordance with the provisions of said Section 75 of the United States Bankruptcy Act as amended, and that they be granted, extended and given all of the benefits, privileges, rights, and immunities provided for in said Section 75 of the United States Bankruptcy Act as amended, and as particularly provided for in Subsection "S" thereof and for such other and further relief as may be meet.

MIRON RUSTIGIAN
HAGOOHI RUSTIGIAN
Petitioners.

Southern District of California
County of Fresno—ss.

Miron Rustigian and Hagoohi Rustigian, each for himself, and not one for the other, being first duly sworn, both depose and say:

That he is one of the petitioners named in the foregoing petition; that he has read the same and knows the contents thereof; that the same is true

of his own knowledge except as to matters therein stated on information or belief, and as to those matters that he believes it to be true.

MIRON RUSTIGIAN

HAGOOHI RUSTIGIAN

Subscribed and sworn to before me this 20th day of August, 1940

[Seal]

FRED J. ROGERS

Notary Public in and for said County and State.

[6]

[Title of District Court and Cause.]

ADJUDICATION, ORDER OF REFERENCE,
AND TEMPORARY RESTRAINING ORDER

Under Section 75-s, Bankruptcy Act.

At Los Angeles, in said District, on August 23, 1940, before said Court in Bankruptcy, the Petition of Miron Rustigian and Hagoochi Rustigian, husband and wife, debtors in the above-entitled matter, that they be adjudged bankrupt under the terms and provisions of Section 75-s of the Bankruptcy Act, and within the true intent and meaning of the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said Miron Rustigian and Hagoochi Rustigian, husband and wife, are hereby declared and adjudged bankrupt accordingly.

It is thereupon ordered that said matter be referred to John D. Boyle, the Conciliation Commissioner for Madera County, to act as Referee in

Bankruptcy of this Court and to take such further proceedings therein as are required by said Acts; and that the said Miron Rustigian and Hagoochi Rustigian, husband and wife, shall attend before said Conciliation Commissioner, acting as Referee, at his office in Madera, California, on Aug. 30, 1940, at 10:00 o'clock a. m. and shall submit to such orders as may be made by said Conciliation Commissioner, acting as such Referee or by this Court relating to said matter in Bankruptcy.

And it is further ordered, adjudged and decreed that all creditors of the above-named bankrupts be and they are hereby enjoined and restrained from commencing or maintaining any judicial or official proceedings in any Court, or under the direction of any official against the said bankrupts or any of their property, and from proceeding with any sale of the Bankrupt's property under the terms of any Deed of Trust, until further order of this Court.

Witness, the Honorable Harry A. Hollzer, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on August 23, 1940.

[Seal] R. S. ZIMMERMAN, Clerk,
By G. S. WHITE
Deputy Clerk

[Endorsed]: Filed Aug. 23, 1940. [7]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

I, Herbert McDowell, United States Conciliation Commissioner at Fresno, California, respectfully certify and submit as certificate on review, the following:

1. That the above entitled matter was referred to John D. Boyle, Conciliation Commissioner of Madera, to act as Referee in Bankruptcy under Section 75S of the Bankruptcy Act, on August 23rd, 1940; that thereafter and on January 26th, 1942, by reason of the resignation of John David Boyle and by order of Paul J. McCormick, United States District Judge, the above entitled matter was referred to me as Conciliation Commissioner, and the said matter is now pending before me as Conciliation Commissioner.

2. That during the course of said proceedings and on the 29th day of June, 1942, Fred J. Rogers, attorney for the debtors, filed a petition verified by Hagoohi Rustigian, one of the debtors, on June 24, 1942, wherein the debtors prayed for the payment of the sum of \$1500.00 on account of counsel fees. From said petition it appeared that an action had been filed by one E. D. Campbell as plaintiff against Miron Rustigian and Hagoohi Rustigian, the debtors, and one Harry Rustigian as defendants in the Superior Court of the State of California for the County of Madera. In that action, the said E. D. Campbell sought a judgment declaring that he was the owner of the real property

which constitutes the sole asset of this estate, and further [8] adjudging that the debtors above named had no right, title or interest in said property. The plaintiff E. D. Campbell also sought possession of said property in said action. In order to defend said action it was necessary that counsel be retained and, for this purpose, the said Fred J. Rogers retained as associate counsel Frank Curran and David E. Peckinpah, both of whom are attorneys having their offices in Fresno, California. In that action, the jury brought in a verdict in favor of the defendants but thereafter the trial court granted a new trial and the action has not yet been disposed of.

In the petition of Miron Rustigian and Hagoohi Rustigian they asked for the payment of \$1500.00 to Fred J. Rogers, Frank Curran and David E. Peckinpah as a payment on account of services rendered in defending the action in the Superior Court, Madera County, hereinbefore referred to.

3. That said petition was duly noticed for hearing before me on the 29th day of July, 1942, said notice having been given to each of the creditors named in the schedules filed by the said debtors at the places of residence or address, as the same was designated in said petition, or as subsequently filed by the creditors with the referee.

4. That in opposition to the petition of the said Fred J. Rogers there were filed the following:

A. Objections of Security National Bank of Los Angeles, a secured creditor.

B. Objections of Bank of America N. T. & S. A.

5. That thereafter and on the 14th day of August, 1942, the said matter was heard before the undersigned, the debtors being present in person and being represented by Fred J. Rogers, their attorney; the objectant, Security First National Bank of Los Angeles, being represented by Claude L. Rowe, Esq., its attorney; the objectant, Bank of America N. T. & S. A. being represented [9] by Daniel I. Schnabel, Lawrence W. Young, and William B. Backlund, its attorneys.

6. That during the course of said hearing, oral evidence was adduced, the following witnesses having been sworn and having testified: Matt Goldstein, David E. Peckinpah and Fred J. Rogers. A transcript of the testimony of said witnesses is hereto annexed and made a part hereof.

7. That thereafter and on November 25th, 1942, a written order was made by the undersigned as Conciliation Commissioner, granting said petition to the extent of allowing and awarding to Fred J. Rogers, attorney for the petitioner, the sum of \$1500.00 to be paid on account of attorneys' fees for services rendered in defending said action.

8. That, through inadvertence, the undersigned, as Conciliation Commissioner, failed to make findings of fact and conclusions of law, and to this extent the said order is defective and the matter should, in the opinion of the undersigned Conciliation Commissioner, be referred back to the undersigned for the purpose of making findings of fact and conclusions of law.

9. That the Bank of America N. T. & S. A., by its attorneys Edmund Nelson and Daniel I. Schnabel, Esqs., has filed its petition to review said order made by the undersigned on November 25, 1942, which petition to review is transmitted herewith.

10. That by the same petition the said Bank of America N. T. S. A. also seeks to review a former and prior order made by the undersigned on February 25, 1942, by the terms of which order the undersigned awarded to the said Fred J. Rogers the sum of \$750.00 on account of counsel fees for services theretofore rendered by the said Fred J. Rogers as attorney for the debtors in the above entitled proceeding.

11. That said attorneys' fees awarded to the said Fred J. Rogers by order made on February 25, 1942, were awarded by [10] reason of a petition filed by the said Fred J. Rogers, duly verified by him on February 5, 1942, and filed with the undersigned on February 7, 1942, and after a hearing before me on February 25, 1942, in which evidence was offered in support of the allegations of said petition.

12. That there is transmitted herewith the following papers:

(1) Petition verified by Fred J. Rogers on February 5, 1942, and filed with the undersigned on February 7, 1942.

(2) Order made by the undersigned on February 25, 1942.

(3) Petition of Miron Rustigian and Hagoohi

Rustigian, verified by Hagoohi Rustigian on June 24, 1942.

(4) Objections filed by Security First National Bank of Los Angeles, dated July 16, 1942.

(5) Objections filed by Bank of America N. T. & S. A., verified July 30, 1942.

(6) Testimony of Matt Goldstein, David E. Peckinpah and Fred J. Rogers given before me on July 29, 1942.

(7) Affidavit of mailing dated July 6, 1942.

(8) Order made by the undersigned dated November 25, 1942.

(9) Petition to review filed by Bank of America N. T. & S. A. December 3, 1942.

Dated: Fresno, California, this 10th day of April, 1943.

HERBERT McDOWELL

Referee

[Endorsed]: Filed April 12, 1943. Herbert McDowell, Referee. Helene McDowell, Clerk. [11]

[Title of District Court and Cause.]

PETITION FOR ORDER PERMITTING THE
PAYMENT OF MONEYS FOR ATTOR-
NEYS' FEES

To the Hon. Herbert McDowell, Referee:

Come now the above named debtors, Miron Rustigian and Hagoohi Rustigian, and respectfully represent:

That there is involved in the within proceedings the following described real property lying and being in the County of Madera, State of California, to-wit:

The south half of the northeast quarter of the southeast quarter, and the south half of the southeast quarter, of Section 33, Township 12 South, Range 17 East, Mount Diablo Base and Meridian.

That on the 27th day of November, 1941, there was brought in the Superior Court of the State of California, in and for the County of Madera, that certain suit entitled: E. B. Campbell, Plaintiff, vs. Harry Rustigian, Miron Rustgian and Hagoohi Rustigian (also known as Haigouhi Rustigian), husband and wife, John Doe, Jane Doe, and Doe Company, a corporation, Defendants, No. 6014, and the object and purpose of said suit being an attempt on the part of the plaintiff to divest these debtors of their entire ownership and interest in and to said real property, and all crops now growing thereon.

That said suit represented and was the culmination of efforts on behalf of the plaintiff and his assignor, the Bank of America National Trust and Savings Association to divest these debtors of all their right and ownership in and to said real property and the crops now growing thereon, and the said trial came on regularly for hearing before said Superior Court on the 27th day of May, 1942, before a jury, and the trial was not completed until the 29th [12] day of May, 1942, at which time the jury

brought in and rendered a verdict in favor of these debtors;

That for over a year prior to the filing of said Superior Court suit the said plaintiff, his said assignor, and the Security First National Bank of Los Angeles, had joined in a concerted and well mapped program whereby these debtors would be deprived of their property, and the efforts of said institutions and their satellites continued up to the termination of said trial and still continues, whereby the said institutions have exerted every conceivable effort to accomplish their desires as above indicated; that a motion for a new trial made on behalf of the plaintiff is now pending before said Superior Court.

That it was necessary and desirable for these debtors to obtain adequate counsel to carry on and maintain the defense to the efforts of said institutions and in this connection these debtors did, approximately two months before the trial of said cause, retain Frank Curran, an attorney at law, and their regular attorney herein, Fred J. Rogers, has worked continuously in connection with said litigation; that approximately two weeks before the said trial these debtors retained and engaged David Peckinpah to also assist in carrying on the defense to said suit; that for a period of approximately ten days prior to said trial at least two of said counsel devoted practically all of their time and attention to the preparation of the defense to said litigation, and all three of said counsel devoted all of their

time and attention to the trial of said case during the three days devoted to such trial;

That the within debtors desire at this time to pay unto the said three counsel the sum of \$1500.00, in connection with the services they have heretofore rendered in connection with said litigation, and that the within Court make and enter its order granting and permitting the within debtors to immediately proceed [13] to pay said sum unto said three attorneys; that the payment of said sum at this time is a reasonable amount to be so paid, and had it not been for the efficient and continuous services rendered by said attorneys in connection with said litigation the within debtors would have, in all probability, been deprived of their ownership in and to said property and thereby have been deprived of property of the reasonable value of not less than \$20,000.00.

Wherefore, the within debtors pray that the within Court make and enter its order permitting them to immediately pay unto Frank Curran, David Peckinpah and Fred J. Rogers the sum of \$1500.00, and for such other and further orders as may be meet.

FRED J. ROGERS

Attorney for Debtors

State of California,
County of Fresno—ss.

Hagoohi Rustigian, being first duly sworn, deposes and says:

That she is one of the debtors above named; that

she has read the foregoing Petition for Order Permitting the Payment of Moneys for attorneys' fees, and knows the contents thereof; that the same is true of her own knowledge, except as to matters therein stated on information and belief and as to those matters that she believes it to be true.

HAGOOHI RUSTIGIAN

Subscribed and sworn to before me this 24th day of June, 1942.

FRED J. ROGERS

Notary Public in and for said County and State.

[Endorsed]: Filed June 29, 1942. Herbert McDowell, Referee. Helene McDowell, Clerk. [14]

[Title of District Court and Cause.]

OBJECTIONS OF SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, SECURED CREDITOR, TO PETITION FOR ORDER PERMITTING THE PAYMENT OF MONIES FOR ATTORNEYS' FEES

To the Honorable, the above entitled District Court of the United States, and to Herbert McDowell, Esq., the Conciliation Commissioner—Referee, to whom the above entitled matter has been referred:

This, the Objections of the Security-First National Bank of Los Angeles, a National Banking Association, organized and existing under and by virtue of the laws of the United States of America,

with its principal place of business in the City of Los Angeles, County of Los Angeles, State of California, respectfully represents and shows:

I.

That this Objector is a secured creditor of the above named Bankrupts and that, pursuant to notice duly given, Objector did, on or about the 11th day of June, 1940, file with former Conciliation Commissioner, John David Boyle, predecessor of the Conciliation Commissioner herein, its verified proof of its secured claim against said Bankrupts, setting forth

Unpaid principal balance	\$15,187.50
Interest thereon at 6% per annum from December 31, 1938	

II.

That the amount of said claim at this time is as follows:

Unpaid principal balance	\$15,187.50
	[15]

Advances made by Beneficiary under
terms of Deed of Trust \$295.42
Interest is paid to February 16, 1940,
ONLY.

III.

That, on or about February 25, 1942, Conciliation Commissioner Herbert McDowell, acting as Referee, entered an Order directing the payment of \$750.00 to Fred J. Rogers, Attorney for the Bankrupts, from funds of said Bankrupts' estate, on account of counsel fees for services theretofore and there-

after to be rendered in connection with the action instituted by E. B. Campbell against said Bankrupts and others on or about November 27, 1941.

IV.

That, on or about June 29, 1942, the above named Bankrupts filed in this Court, a "Petition for order permitting the payment of monies for attorneys' fees" praying for an Order to pay from this Bankrupt estate the sum of \$1,500.00 to Fred J. Rogers, Attorney of record for the above named Bankrupts, and to Frank Curran, Attorney at Law, and David Peckinpah, an Attorney at Law, in addition to the fee of \$750.00 already paid to Fred J. Rogers less than five months' ago for services arising from the same aforementioned action.

V.

That neither of the latter two named attorneys, Frank Curran or David Peckinpah, were employed or engaged by said Bankrupt estate and at the expense of said bankrupt estate upon Order of the Court or Referee first obtained, as required by the Rules of Practice and Procedure in the District Court of the United States.

VI.

That neither assets nor property were brought into this Bankrupt Estate through the efforts of said three Attorneys for the services performed by them and that the \$750.00 hertofore paid to Fred J. Rogers, Attorney, from this Bankrupt Estate, is a fair and adequate fee for services in defense of the

aforesaid Quiet Title Action involving property
appraised at \$ [16]

VII.

It is the contention of this Objector that the Conciliation Commissioner in this matter should deny the "Petition for Order Permitting the Payment of Monies for Attorneys' Fees" for the following reasons:

Section 64—National Bankruptcy Act—(a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of Bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition;—and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed—to the Bankrupt in voluntary and involuntary cases, as the Court may allow—.

Said Section 64 defines the rule for paying out the money arising from the Bankrupts' property which remains for general distribution after all special liens and encumbrances have been dealt with.

In re: Brannon 62F. (2) 959

The words used by the legislature cannot be extended by the Courts to cover cases not comprehended by the statute, merely because the case in hand may be thought equally meritorious with those that are given a special value.

In re: Estey 6F Supp. 570

S. Bell Tel. vs. Caldwell 67F. (2) 802

Section 64a (1) gives priority to actual and necessary costs of preserving the Bankrupt estate and to the cost of administration, including one reasonable attorney's fee for the Bankrupt in a limited class of cases.

In re: Realty Associates Sec. Corp. 69F. (2)

41

Dunn vs. Interstate Bond Co. 68F (2) 364

Evenod Perfumer Inc. 67F. (2) 878

The authorities, while sanctioning fees for preparing the petition and the schedules, for securing the adjudication, and for attending the creditors' meeting and the examination of the Bankrupts, refuse compensation (unless through the effort of the Bankrupts' attorney assets are brought into the estate) for any other services except such as were rendered before a [17] trustee was appointed and which are beneficial to the estate. The allowance to the Bankrupts' attorney is limited strictly to the few acts required to be done by him before a trustee is appointed. After that, the Bankrupts' attorney may not receive compensation unless he has performed services which have resulted in bringing assets or property into the estate.

In re: Cheney 300F. 465

In determining the amount of the allowance, the need for economy in administration must be kept in mind at all times.

In re: Curtis 100F. 784

In Re: Barceloux 74F. (2) 288

Callaghan vs. R. F. C., 297 U. S. 464

In re: Rothman 14F. Supp. 241

In re: Owl Drug Co. 16F. Supp. 139

Cohn vs. Edler 90F. (2) 823

The Bankrupts' attorney is entitled only to compensation out of the estate for services which, though performed for Bankrupts, are in reality an aid to the estate in its administration. The Bankruptcy Act does not contemplate that the estate shall be burdened with the expense of furnishing an attorney for the Bankrupts every time they appear before the Referee, and further, the attorney's compensation is limited to services rendered to the Bankrupts while performing the duties devolving on him under the Act. It does not include services rendered prior to the institution of the bankruptcy proceedings. The duties for which the attorney may receive compensation are those imposed by the Act and no others. These duties are set forth in Section 7 of the Bankruptcy Act.

In re: Herald-Post Inc. 21F. Supp. 231

In re: Krispy Baking Co. (American Bankruptcy Review, February, 1938, 219)

It is well settled that, where a secured creditor is required to come into a Court of Bankruptcy to protect his lien on specific property, he should not ordinarily be charged with any part of the costs of the general administration of the estate. [18]

Mills vs. Va. Co. Lumber Co. 164 Fed. 168

Byrer vs. Bushong 42 A. B. R. 14

There can be no allowance for the Bankrupts' attorney's fees not connected with the direct preservation of the property

In re: Goldville Mfg. Co. 10 A. B. R. 552

In re: Freeman 190F 48

In re: Frick 1 A. B. R. 719

In re: Prince and Walter 131F 546

Remington on Bankruptcy, Volume 6, Section 2674 "For many of the services ordinarily performed, the attorney must seek his pay from his own client rather than from the Bankrupt's estate".

Remington on Bankruptcy, Volume 6, Section 2674.50 "There seems to be no objection to the Court's ad interim allowances from time to time on account of attorney's fees of the receiver or the trustee; but allowances to the Bankrupt for the services of their attorneys, depend on statute, section 64 (b) of the Act; 11 U. S. C. A. Section 104, and are regulated thereby; and the conditions that only one fee shall be allowed and that for services actually rendered would seem to preclude ad interim allowances to such attorneys".

Section 75 (b) "—no fees, costs or other charges shall be charged or taxes to any farmer or to his creditors by any Conciliation Commissioner or with respect to any proceedings under this section, except as hereinbefore in this section provided—".

Rancho San Carlos Inc. vs. Greene 93F 338
9th Cir. Calif.

Where a secured creditor is required to go into a Court of Bankruptcy to protect his lien on specific property, he should not ordinarily be charged with any part of the costs of the general administration of the estate. In this case, appellant, attorney for the Bankrupt in a Section 75 (s) [19] proceedings, contended that a reasonable attorney's fee for the attorney for the Bankrupts is properly taxable as a part of the costs under Bankruptcy Act, Section 64, sub. (a) (1), are payable out of the general assets of the estate, and that there is nothing in Section 75 subjecting property of mortgagees to their payment.

Byrer vs. Bushong 42 A. B. R. 14

By reason of the foregoing principles of law and fact, it is respectfully submitted that the "Petition for Order Permitting the Payment of Monies for Attorneys' Fees" should be denied.

Dated this 16 day of July, 1942.

CLAUDE L. ROWE

Attorney for Security-First
National Bank of Los Angeles

[20]

Due Receipt of the annexed objections admitted this 16th day of July, 1942.

FRED J. ROGERS,

Attorney for Bankrupts.

[Endorsed]: Filed July 16, 1942. Herbert McDowell, Referee. Helene McDowell, Clerk. [21]

[Title of District Court and Cause.]

OBJECTIONS OF BANK OF AMERICA N. T.
& S. A. TO PETITION FOR ORDER PER-
MITTING THE PAYMENT OF ATTOR-
NEYS' FEES TO FRED J. ROGERS,
FRANK CURRAN AND DAVID PECKIN-
PAH

To the Honorable Judges of the District Court of
the United States, Southern District, Northern
Division, and to the Honorable Herbert Mc-
Dowell, Conciliation Commissioner in and for
the County of Fresno:

Comes now Bank of America National Trust and
Savings Association, successor in interest and as-
signee of E. B. Campbell, and objects to the pay-
ment of the attorneys' fees prayed in that certain
Petition for Order Permitting the Payment of
Moneys for Attorneys' Fees filed herein on the 29th
day of June, 1942.

Said objection is based on the following facts
and circumstances, to-wit:

I.

Title to the Madera County real property upon
which the above named bankrupts predicate their
status as farmers has at all times since May 24,
1940 been claimed by Bank of America National
Trust and Savings Association, and the title to said
real property is at this time the subject of pending
litigation.

That should your petitioner, Bank of America National Trust and Savings Association, succeed in the said pending litigation, no part of the said real property, nor of the rents, issues and profits therefrom accruing since May 24, 1940, will constitute [22] an asset of the above named estate.

That the sole source from which the attorneys' fees prayed could be paid are the rents, issues and profits from the aforesaid Madera County real property, title to which is presently in dispute in the said pending litigation.

II.

The Petition for attorneys' fees prays for an exorbitant and excessive amount; that whereas, by law the debtors can never be allowed more than one reasonable attorneys' fee, the petition to which this objection is made prays for attorneys' fees for three attorneys.

III.

That no order authorizing the employment of any attorney named in the Petition for Attorneys' fees was ever made by the above entitled Court or Conciliation Commissioner, nor was any petition for such employment ever made to the above entitled Court or Conciliation Commissioner by the above named bankrupts, or either of them.

IV.

That recently heretofore and on or about February 25, 1942, an order was entered herein by Herbert McDowell, United States Conciliation Commissioner, directing the payment of Seven Hundred

Fifty Dollars (\$750.00) to Fred J. Rogers, Attorney for the bankrupts, from the funds of said bankrupts' estate, on account of alleged counsel fees for services theretofore and thereafter to be rendered in connection with the above named litigation instituted by your petitioner Bank of America National Trust and Savings Association by and against the said bankrupts, which order was not based upon a prior order authorizing the employment of the said Fred J. Rogers, as attorney for the bankrupts, nor upon any petition by the above named bankrupts, or either of them, for an [23] order authorizing such employment of the said Fred J. Rogers.

V.

That the value of the alleged services rendered the above entitled bankrupts cannot be determined until the outcome of the pending litigation concerning the said Madera County real property, and for this reason, it would be premature to make any present allowance of attorneys' fees.

Wherefore, your objecting Petitioner, Bank of America National Trust and Savings Association, prays that the Petition for Order Permitting the Payment of Moneys for Attorneys' Fees be denied, and that the Court Order and direct that Fred J. Rogers forthwith return to the above named estate any and all funds paid him from the assets

of the above named estate made under the authority of the aforesaid Order of February 25, 1942.

Respectfully submitted,

BANK OF AMERICA NATIONAL
TRUST AND SAVINGS
ASSOCIATION,

By WARNER EDMONDS

Vice President,

Petitioner.

EDMUND NELSON

DANIEL I. SCHNABEL

Attorneys for Petitioner. [24]

State of California,

County of Los Angeles—ss.

Warner Edmonds, being by me duly sworn, deposes and says: That he is an officer, to-wit: a Vice President of Bank of America National Trust and Savings Association, Petitioner in the foregoing Objections, and as such officer is duly authorized to make oath for and on behalf of said corporation; that he has read the foregoing Objections and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

WARNER EDMONDS

Subscribed and sworn to before me this 30th day of July, 1942.

CLARA KLEINMAN

Notary Public in and for said County and State.

[Endorsed]: Filed Aug. 3, 1942. Herbert McDowell, Referee. Herbert McDowell. [25]

[Title of District Court and Cause.]

ORDER PERMITTING THE PAYMENT OF
MONEYS ON ACCOUNT OF ATTORNEY
FEES

The petition of Miron Rustigian and Hagoohi Rustigian for approval of the payment of moneys on account of attorney fees, came on regularly for hearing on the 14th day of August, 1942, said petitioners appearing in court and by their attorney Fred J. Rogers; Bank of America, National Trust and Savings Association, appearing by its attorneys Daniel I. Schnabel, Lawrence W. Young and William B. Backlund; Security First National Bank of Los Angeles appearing by its attorney Claude L. Rowe.

Evidence both oral and documentary was offered and introduced, for and against said petition and the matter having been submitted for decision, and good cause appearing therefore.

It is hereby ordered, adjudged and decreed, that Fred J. Rogers, attorney for the petitioners be allowed and that there be paid to him by the within

debtors the sum of \$1500.00 on account of his attorney fees.

Dated: This 25th day of November, 1942.

HERBERT McDOWELL

Conciliation Commissioner.

[Endorsed]: Filed Nov. 25, 1942. Herbert McDowell, Referee. Helene McDowell, Clerk. [26]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING NOTICE

State of California,
County of Fresno—ss.

Helene McDowell, being first duly sworn, deposes and says:

That she is a resident of the County of Fresno, State of California, Clerk of the above Court, and was not at any of the times herein mentioned, and is not now, interested in the foregoing matter.

That on the 6th day of July, 1942, affiant deposited in the United States Post Office, in the City of Fresno, a copy of: Notice of Special Meeting of Creditors in Proceedings Under Section 75-S of the Bankruptcy Act, and Notice on Petition for Order Permitting the Payment of Moneys for Attorneys' Fees in the matter of the said above named Debtors, a copy of which is hereto attached, inclosed in an envelope duly addressed to each of the Creditors named in the schedules filed by said Debtors, at

his place of residence or address as same is designated in said Petition, or as subsequently filed by the Creditor with the Referee; that said envelope bore the frank of Herbert McDowell, Conciliation Commissioner, as provided by law; that there is a regular communication by United States mail from said Post Office of deposit thereof as aforesaid, to each of said Creditor's place of residence.

HELENE McDOWELL

Subscribed and sworn to before me this 6th day of July, 1942.

[Seal]

HERBERT McDOWELL

Notary Public in and for said County and State.

[Endorsed]: Filed July 6, 1942. Herbert McDowell, Referee. Helene McDowell, Clerk. [27]

[Title of District Court and Cause.]

PETITION TO REVIEW ORDERS OF
CONCILIATION COMMISSIONER

Comes now your Petitioner, Bank of America National Trust and Savings Association, and respectfully shows:

I.

That Petitioner is a national banking association duly organized and existing under and by virtue of the laws of the United States.

II.

Petitioner claims all right, title and interest in and to the Madera County real property upon which

the above named debtors predicate their status as farmers, and the title to said real property at this time is the subject of the pending action to quiet title, in which action your petitioner is the plaintiff.

III.

Should your petitioner succeed in the said pending litigation, no part of the real property, nor of the rents, issues and profits therefrom accruing since May 24, 1940 will constitute assets of the above named bankruptcy estate.

IV.

That the sole source from which the above named debtors can pay attorneys fees are the rents, issues and profits from the aforesaid Madera County real property, title to which is presently in dispute in the said pending litigation. [28]

V.

That on or about February 25, 1942, an ex parte order was entered herein by the Honorable Herbert McDowell, United States Conciliation Commissioner, directing the payment of \$750.00 to Fred J. Rogers, an attorney purporting to represent these debtors, on account of alleged counsel fees for services theretofore alleged to have been rendered in connection with the above mentioned litigation instituted by your petitioner, and attention is directed to the original of the said order on file herein, which is specifically referred to with like effect as though set out in full; and in this respect, your Petitioner does not know whether the said sum directed by

said order to be paid has or has not been disbursed to the said Fred J. Rogers. No notice of said order of February 25, 1942 was given petitioner within time to review the same, nor was any notice of said order ever given this petitioner at any time.

VI.

That on or about June 29, 1942 the above named debtors filed with the said Commissioner Herbert McDowell a petition for an order permitting the payment of attorneys fees to Fred J. Rogers, Frank Curran and David Peckinpah, which petition was regularly noticed and to which objections on the part of your petitioner were duly filed.

VII.

That the petition for an order permitting the payment of \$1,500.00 to the above named three attorneys was argued and submitted before the said Commissioner McDowell on August 14, 1942.

VIII.

That thereafter, and on or about November 25, 1942, the said Commissioner McDowell made and entered his certain order permitting the payment of moneys on account of attorney fees, and in this respect attention is directed to the original of said order on [29] file herein, which is specifically referred to with like effect as though set out in full.

IX.

That the order of February 25, 1942 is erroneous and illegal in the following respects and particulars:

1. That at a time when your petitioner's claim to the said Madera County real property and all rents, issues and profits therefrom was known to Commissioner McDowell and all parties in interest herein, an ex parte order directing payment of a portion of the disputed assets was made, and no opportunity was given petitioner to ascertain the nature of the alleged services, nor to object to the propriety of the order.

2. That at no time prior to the making of the order of February 25, 1942 were General Orders in Bankruptcy 42 and 44 observed nor was compliance at any time made with the said General Orders.

3. That the said amount of \$750.00 authorized to be paid as attorneys fees by said order of February 25, 1942 was excessive.

4. That the Conciliation Commissioner had no power to direct distribution of the disputed assets for any purpose whatever until title to the same had been determined.

5. That no findings of fact and conclusions of law were made in conjunction with or in support of the order of February 25, 1942, both of which are required by virtue of General Order 37, Rule 52-a of the Federal Rules of Civil Procedure, as stated in *Perry v. Baumann*, 122 F. (2d) 409.

X.

That the order of November 25, 1942 is erroneous and illegal in the following respects and particulars:

1. That said order purports to grant \$1,500.00 attorneys fees to Fred J. Rogers alone, whereas the

petition upon which this order is predicated nowhere prays such relief, but prays only for an order authorizing the debtors to pay from the disputed assets [30] "unto the said three counsel the sum of \$1,500.00", and in this respect petitioner points out that no argument or evidence whatever was introduced at the hearing on the said petition of July 6, 1942 and petitioner's objection thereto concerning the propriety of paying Fred J. Rogers alone the sum of \$1,500.00.

2. That at no time prior to November 25, 1942 were General Orders in Bankruptcy 42 and 44 observed, nor was compliance at any time made with the said General Orders.

3. That an allowance of the sum of \$1,500.00 to Fred J. Rogers is exorbitant and excessive, and in this respect petitioner points out that the said litigation to determine ownership of the said Madera County real property and all rents, issues and profits therefrom is still pending, the original trial in said litigation having been attended with such errors on the part of the said Fred J. Rogers and his purported associates as in the opinion of the trial court judge necessitated a new trial of the issue.

4. That the Conciliation Commissioner had no power to direct distribution of the disputed assets for any purpose whatever until title to the same had been determined.

5. That no findings of fact and conclusions of law were made in conjunction with or in support of the order of November 25, 1942, both of which are required by virtue of General Order 37, Rule 52-a

of the Federal Rules of Civil Procedure, as stated in *Perry v. Baumann*, 122 F. (2d) 409.

Wherefore, Petitioner feeling aggrieved by the provisions of said Orders of February 25, 1942 and November 25, 1942, and each of them, prays that each may be reviewed as provided by the Banruptcy Act, and amended, modified or set aside in all such respects as to the Court seems equitable.

Respectfully submitted,

BANK OF AMERICA NATIONAL
TRUST AND SAVINGS
ASSOCIATION,

By J. L. LATIMER

Vice President.

Petitioner.

EDMUND NELSON and
DANIEL I. SCHNABEL

Attorneys for Petitioner. [31]

State of California

County of Los Angeles—ss.

J. L. Latimer, being by me duly sworn, deposes and says: that he is an officer, to-wit: a Vice President of Bank of America National Trust and Savings Association, Petitioner in the foregoing proceedings, and as such officer is duly authorized to make oath for and on behalf of said corporation; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein

stated upon information and belief, and as to those matters he believes it to be true.

J. L. LATIMER

Subscribed and sworn to before me this 1st day of December, 1942.

CLARA KLEINMAN

Notary Public in and for said County and State.

[Endorsed]: Filed Dec. 3, 1942. Herbert McDowell, Referee. Helene McDowell, Clerk.

[Endorsed]: Filed April 20, 1943. Edmund L. Smith, Clerk, by R. B. Clifton, Deputy Clerk. [32]

TESTIMONY

Re: RUSTIGIAN CONCILIATION HEARING

[33]

MATT GOLDSTEIN:

Called as a witness on behalf of the Debtors, being first duly sworn, testified as follows:

Mr. Rogers: Q. What is your full name?

A. Matt Goldstein.

Mr. Schnabel: Is this gentleman a member of the bar? He has been sworn?

A. I have been sworn at.

Mr. Rogers: Mr. Goldstein, how long have you been practicing law? A. Since 1924.

Q. And where have you practiced?

A. I practiced 14 years in the City of New York and since October of 1938 in Fresno.

Q. And were you associated with Mr. Frank Curran prior to his death? A. I was.

(Testimony of Matt Goldstein.)

Q. And how long have you been associated with Mr. Curran?

A. Ever since I started practicing in Fresno.

Q. And do you know whether or not Mr. Curran had anything to do with the defense of this quiet title suit that we had in connection with the property in this case?

A. I do.

Q. What, if anything, do you know about his activities and work in connection with that defense?

A. Well, it was about a month before the trial that a large folder was brought to the office. I think I brought it. I think I called at Mr. Rogers' office and got it, and then Mr. Curran took that file and together we went over it at times, and there were other times when he worked on the case alone. I did not interview any of the witnesses, but I did confer with him, with Mr. Peckinpah and with Mr. Fred Rogers from time to time. We looked into the questions of law. There were some very, [34] very involved questions of law in the case, especially with reference to the type of evidence that might be admissible under the pleadings. We also prepared instructions for the Court. I know that Mr. Curran prepared a great many trial notes, and I think, although I can't say this positively, that they must have been based on interviews of witnesses, because there were a great many trial notes prepared by him.

Q. About how much time would you say Mr. Curran put on this matter prior to the trial?

A. Well, I know that he turned over practically

(Testimony of Matt Goldstein.)

all of the office work to me for two weeks before this case was tried and devoted his time almost exclusively to the preparation for trial of this case.

Q. And what was the nature of this trial, the litigation in question?

A. Well, I can merely state from the pleadings. I did not go to Madera. That time I was occupied in the trial of a case in the Superior Court of the County of Fresno. I know from the pleadings that it was based upon a claim of title by the plaintiff arising from the purchase through a sale under execution of this property which stood in the names of two of the defendants, I think it was Armon Rustigian—

Q. Myron and Hagoohi.

A. Myron and his wife. I know that, and that one of the defendants was Harry M. Rustigian, and the claim was made in the pleadings that Harry M. Rustigian was the true owner of the property and that Campbell had purchased his title at a sale under execution on a judgment of the Bank of America, so that therefore the action, if successful, would have completely defeated any interest of the [35] husband and wife in this property.

Q. Now, Mr. Goldstein, that trial commenced on May 27 of this year, did it?

A. That is right.

Q. And it was a jury trial?

A. That is correct.

Q. And how many days was consumed in that trial?

A. It was a three-day trial.

(Testimony of Matt Goldstein.)

Q. And how did the case terminate?

A. I understand there was a verdict on the part of the jury in favor of the defendants, husband and wife, the debtors. Also after that prepared findings of fact and conclusions of law. I prepared those with Mr. Curran.

Mr. Young: Go ahead and tell what happened afterwards.

Mr. Rogers: Don't bother: I am examining. You take him later on.

Q. Now, Mr. Goldstein, what, if any effect, did this verdict have on the ability of the debtors to gather the 1942 crop we referred to?

A. Well, if the plaintiff had been successful, of course, they would have had no title whatsoever, any interest in that property, and they would have had no right to gather any crops or to even live on the premises.

Q. And did you arrange with Mr. Curran to proceed with the appeal with myself?

A. That is correct.

Q. From the order granting the new trial?

A. That is correct.

Q. Now, in connection with that order for a new trial, in your opinion what do you feel the prospects are of reversing that order? [36]

(Objection. Objection overruled.)

A. Well, taking the statement for whatever it is worth, I appreciate the fact that any attorney on the losing side can be charged with bias with reference to his judgment of the correctness of the

(Testimony of Matt Goldstein.)

Court's judgment, but it seems to me that any evidence of fraud under those pleadings was utterly inadmissible under very well established cases, and it would also seem to me that the instruction which seemed to be the one attacked which is a restatement of the language of the Code of Civil Procedure and it seems to be the *principle* basis for the court's decision is entirely sound in an action to quiet title, and as a matter of fact, I think must be given. Failure to give it, I believe, would have been error. Now, that is the way I should say that the prospects of an appeal from this new trial order are certainly good, and might be regarded as excellent by an optimist.

Q. Now, Mr. Goldstein, do you know whether or not the debtors or anyone directly or indirectly paid anything for his services?

A. He has been paid nothing. I know that.

Q. Did Mr. Curran specialize in his legal work?

A. Yes. He specialized in trial work. He was primarily a trial lawyer.

Q. And particularly in jury trials?

A. He tried all types of cases, but he was especially successful in jury trials.

Q. Now, in your opinion, what would you say the reasonable value of the services rendered in this case were worth? [37]

A. Are you referring to all of the legal services or only the ones——

(Testimony of Matt Goldstein.)

Q. Well, Mr. Peckinpah, and, if you know, what I did, if anything?

A. Well, in view of the——

(Objection. Objection overruled.)

A. In my opinion the services were worth considerably in excess of \$1500. I take into consideration the difficulties of the case, the amount involved and the standing of the counsel who were in the case. Mr. Peckinpah and Mr. Curran and Mr. Rogers are all very well respected and well-known members of the bar. They are not beginners. They are well known members of the bar. In view of all of the difficulties involved, a fee of \$3000 would not have been excessive.

Q. Now, Mr. Goldstein, do you know anything about the quiet title suit as to the team work of the Bank of America and the Security Bank in attempting to win this case?

A. I know that these people, of course, were being crowded from both ends. The Security-First National Bank was crowding the foreclosure of its mortgage which it had upon the property executed by the husband and wife who were the debtors in this proceeding, and the Bank of America was crowding from the title end, endeavoring to destroy the title of the debtors who executed the mortgage to the Security First National Bank, so that the debtors were caught right squarely in the middle of it in an action where they had formidable antagonists, and they were being caught from both ends of the storm, so to speak. [38]

(Testimony of Matt Goldstein.)

Mr. Rogers: Take the witness.

Cross Examination

Mr. Rowe: Q. Did I understand you over the phone to state that in your opinion that you were going to testify that the services were worth \$1000 or \$1500? Have you changed your opinion?

A. I was speaking of Frank Curran's services standing alone. They were worth between one thousand and fifteen hundred, and that included my own. That is the work our office did.

Q. And your testimony now as to the \$1500, that includes all of the attorneys, is that it?

A. No. I said that in my opinion the attorneys all told would have been justified in asking \$3000, but as I understand they have only asked for \$1500 in this proceeding, but I think the reasonable value of their services was in excess of \$1500 in this case.

Q. That is for all of the attorneys?

A. Yes, that is correct.

Q. And for the complete litigation?

A. For what has been done up to the present time, that is right.

Mr. Young: Q. How much, Mr. Goldstein, are you to get out of this fee?

A. I don't know. I will have to take that up with the executor of Mr. Curran's estate.

Q. You are the attorney for the executor of Mr. Curran's estate?

A. Yes. At his request in his will.

(Testimony of Matt Goldstein.)

Q. You prepared the instructions in the case?

A. I did.

Q. And they were reversed, or rather a new trial was granted on some instruction that you prepared?

A. I am informed that that is one of the grounds. [39]

Q. You know that to be a fact?

A. I wasn't in court, but I am informed that is one of the grounds.

Q. And what benefits, if any, have these defendants received up to date from your services?

A. Well, if you ask it that way, I think I can explain it. If they had been unsuccessful and had lost the case, because they were defendants they couldn't get anything from either of the two banks. All that they could do would be to defend their title. Up to the present time they have not only defended their title successfully, but they have gotten a jury to hold that that title is not subject to attack by the Bank of America or its representative, Mr. Campbell, so they have protected their title up to the present time against a very powerful attack from a very large financial institution with the benefit of very able counsel. That is point one. In the second place, they have gotten a breather in the sense that they now will be able to harvest their crop and apply it toward the payments, at least, as far as any revenue, the net revenue is derived from that crop, apply it toward the payment of their legitimate bills, toward the pro-

(Testimony of Matt Goldstein.)

tection of the title of the property and also the maintenance and operation of the property, and until the bank succeeds in getting an affirmative judgment through Mr. Campbell against them, their title is good against the world, so they can continue to enjoy their property. To me that seems to be a very substantial benefit. They have a very sizable investment here. They have devoted a good many years to the improvement of this property, and [40] it would seem to me that is—well, the value can't be estimated because if they were unsuccessful, they wouldn't have anything, so to my mind if it hadn't been for their attorneys being successful in holding the banks back, they wouldn't have anything at all.

Mr. Young: Q. Well, Mr. Goldstein, you have discussed this matter with Mr. Curran?

A. A great many times.

Q. And he told you he had a contingent fee?

A. No, he did not. He never told me what his fee was.

Q. Did you ever ask him?

A. I know I spoke to Mr. Rogers about it.

Q. Did you ever ask Mr. Curran what his fee was?

A. No, I can't say. I just knew generally that a fee would have to be passed upon by the conciliator. I realized then they couldn't have any agreement for fees in this case, because all fees are subject to the approval of the court. I don't think I

(Testimony of Matt Goldstein.)

ever asked him, and I know I did not know what his fee was.

Q. You have known Mr. Curran how long?

A. For about four years.

Q. And you have been with him in the trial of cases at other times? A. Many times.

Q. And you know Mr. Curran was known around here as a lawyer of skill, but he was a lawyer who insisted upon his fees being fixed before he went into court?

A. Mr. Young, I can answer that by saying that you don't know anything about him, if you say that. [41]

Q. That isn't the information I have.

A. Because that man, he did more work for nothing than any lawyer in this court room, and I am not casting aspersions on anybody. He did more able work for more poor people for not a cent of compensation. You don't know about it, but I do. Incidentally, he used to make me help him out in those cases, so I know about it. Reputation and character are two different things.

Q. I want you to understand I am not throwing any aspersions on Mr. Curran.

A. I understand.

Mr. Rowe: Q. Mr. Goldstein, I understand a fee of either, somewhere between 1500 to \$3,000 for all of the attorneys for their work in this case to date would not be unreasonable, somewhere between 1500 and \$3,000?

A. I think that is fair. It is pretty hard to put a dollar and cent value on these things, but I

(Testimony of Matt Goldstein.)

think a fee of \$3,000 would not be in my judgment, would not be excessive and certainly \$1500 in my opinion is low, is decidedly low.

Q. But not unreasonable, you would say?

A. Well, I have said that 3,000 is reasonable.

Q. Yes. And \$1500 is not unreasonable, isn't that the way you stated?

A. I think it would be unreasonably low.

Q. You do? A. I do.

Mr. Rowe: That's all as far as I am concerned.

The Conciliator: Any other questions, gentlemen?

Mr. Rogers: No further questions.

Mr. Backlund: May I ask one question? [42]

(Objection.)

Mr. Young: Q. What agreement, if any, if you know was had with Mr. Dave Peckinpah as to his fee?

A. I know nothing about the arrangement. I didn't participate in it. I can't testify to it.

Mr. Young: That's all.

Mr. Rogers: All right. Mr. Peckinpah, will you come forward and be sworn, please?

DAVID E. PECKINPAH

called as a witness on behalf of the Debtors, being first duly sworn, testified as follows:

Mr. Rogers: Q. What is your full name?

A. David E. Peckinpah.

(Testimony of David E. Peckinpah.)

Q. And, Mr. Peckinpah, you are an attorney-at-law? A. I am.

Q. And how long have you been practicing?

A. I have been practicing since December of 1921 in Fresno, California.

Q. Continuously? A. Continuously.

Q. And what, if anything, did you have to do with the defense of this quiet title suit we have been talking about?

A. I participated in the trial and the preparation thereof for the trial.

Q. And that trial was before a jury, was it?

A. That trial was before a jury in the Superior Court of Madera.

Q. And how many days were consumed in the actual trial? [43]

A. Three days in the actual trial.

Q. And you were there all three days continuously?

A. I was there continuously all three days.

Q. And what, if any, time did you put in prior to the trial in preparation?

A. Well, altogether a little more than two days before it. I didn't intend to put any preparation in other than to have a conference with you and Mr. Curran, but certain events came up and I did do more preparing than I intended to.

Q. Now, what was the nature of the litigation as to the Security Bank, Security First National Bank of Los Angeles and Mr. Campbell joining together in the trial of the case?

(Testimony of David E. Peckinpah.)

A. Well, as I understood, the Security First National Bank held a mortgage against the property and had started foreclosure proceedings and then had gone before the Conciliation Commissioner. The Bank of America claimed that one Harry Rustigian owed them a lot of money, and he was related to the people that owned this 100 acres, and it seemed to be producing pretty well, and so they brought suit to declare him the owner of the land, and the litigation was on that basis. The Security First National Bank didn't appear with counsel or evidence other than to ably assist by testimony and opinions the Bank of America's contentions.

Q. Yes. Now, what was the result of that trial?

A. The result of the trial was a unanimous verdict.

Mr. Young: Ten to two, Mr. Peckinpah.

A. I understood it was a unanimous verdict for the defense. [44]

Mr. Backlund: The jury was polled.

A. Ten to two?

Mr. Backlund: Yes.

Mr. Rogers: Q. For the debtors in this case?

A. For the debtors in this case.

Q. And what, if any, practical results followed the trial after the motion for a new trial was granted?

A. Well, the results were that the defendant owners of the land were still in possession under

(Testimony of David E. Peckinpah.)

the supervision of the Conciliator, and can take the crops and apply them to the indebtedness and can continue to farm the property. Had the verdict been adverse, of course, that wouldn't have been possible.

Q. And as to the prospective outcome of an appeal?

A. Prospective outcome of an appeal, it is my considered opinion that the order of the Court granting a new trial ought to be promptly reversed. It was a mistake, and it is my opinion that it will be reversed, because the case was tried by able counsel for the plaintiff on a mistaken theory and against their pleadings. Their pleadings were erroneous on the theory that they tried the case, and the court erred in not sustaining the objections we made to their evidence, and that alone ought to set aside the order granting a new trial and probably will.

Q. Now, do you know about anything, as to what, if anything, I might have done in connection with this case and the preparation of it?

A. Yes, I do. As to the two days that [45] I spent before the trial, I know that you were working all of the time, and I know that before that in one or two discussions that I had with you and Mr. Curran you had spent several nights interviewing witnesses and in preparation of this case, and I know from the work that I did with you the two days immediately previous to the commencement

(Testimony of David E. Peckinpah.)

of this trial that you must have spent a great many days before that time in working up the evidence and the law in the case.

Q. Mr. Peckinpah, were you directly or indirectly paid any money for your services or efforts in this case?

A. I have not been paid anything yet.

Q. What, if any, arrangements were made with you to compensate you for your efforts?

A. Well, you came to my office several weeks after the case was set, and asked me if I would be willing to assist in the trial and do a part of the trial work in the case, and you asked me what my compensation—what I would desire for compensation, and I told you if I wasn't required to draw the instructions or prepare a trial brief and that my responsibility would be in the active examination of the witnesses only, that my charges would be \$150 first day, and \$100 a day thereafter. When the time came to actively get ready for the trial and when I felt it was necessary that I interview several of the witnesses and discuss many law points that came up in reference to the pleadings with you, I suggested that our arrangements would be unsatisfactory, because it was only based upon actual trial work, but that I would be willing to leave it up to you [46] to fix reasonable compensation for the time put in before the trial, and you said that you would do so, and it was left that way. There was no fixed sum. I might add that the

(Testimony of David E. Peckinpah.)

\$100 that you fixed was unsatisfactory to me, but I am willing to abide by it.

Q. You mean the \$100 for the additional time?

A. Yes. There were \$350 used up in the trial of the case, so the \$450 you asked for me, I assume that \$100 you have added for my time in preparation of the case. I thought it was too small, but I agreed to allow you to make the decision so I am not complaining about it.

Q. And, Mr. Peckinpah, what in your opinion would be a reasonable attorney fee to be allowed by the Court in the carrying on of the defense of the entire quiet title suit up to and including the trial?

A. Up to and including this trial. For how many attorney fees?

Q. Yourself and Mr. Curran and myself?

A. I think that the \$450 asked for me is very reasonable, almost to the point of being unreasonably low, considering the results of the case and the work and the responsibility, but that was fixed on a per diem basis, so I don't think I should complain about it. As far as the work Mr. Curran did who actively participated in the trial of the action and the work you did in the preparation of the case before the trial and during the trial, I would say that \$2500 would be a very reasonable fee for you.

Mr. Rogers: Take the witness. [47]

(Testimony of David E. Peckinpah.)

Cross-Examination

By Mr. Young:

Q. Mr. Peckinpah, let me ask you a couple of questions. You say that you spent days and nights interviewing witnesses.

A. I didn't say any such thing.

Q. You did say you spent one day and one night?

A. I didn't say any such thing.

Q. Did you interview any witnesses at all?

A. Yes.

Q. How long did it take?

A. How long did it take?

Q. Yes.

A. Oh, I would say it would take probably altogether in talking to witnesses, seven or eight hours.

Q. And how many witnesses did you interview?

A. Well, I would have to consult my books to tell you.

Q. Isn't it true that the only witnesses you interviewed were Myron Rustigian and his wife?

A. No. I am not going to tell you who I interviewed because I expect to be in the trial again.

Q. You will put them on the stand?

A. You are not going to find out about it.

Q. Not that I am interested in who they were, but I think we have a right to know how many?

A. I will give you an idea of how many.

Q. All right.

A. I interviewed to the best of my recollection, I think six. I am not sure about that.

(Testimony of David E. Peckinpah.)

Q. And as a matter of fact, the only witnesses you used at the time of the trial were Mr. and Mrs. Rustigian, the defendants, and Harry Rustigian? A. Uncle Harry.

Q. Uncle Harry and the defendants and a man by the name of [48] Kuya (?)?

A. I think that was all used. That is all we found necessary to use, Mr. Young, the way you tried the case.

Q. Well, now you had nothing at all to do with the erroneous preparation and making up of the instructions?

A. There was no erroneous preparation of the instructions. There was an erroneous ruling by the judge.

Q. I take it you are in a position to determine that over and above the judge?

A. I think I am. I think the appellate court will sustain me.

Mr. Young: I think that's all.

Mr. Rowe: Mr. Peckinpah, did you have any conversation with Mr. Curran about how much he was to receive or what would be the reasonable value of his services in this case?

A. No, I haven't. No, I haven't any idea of what his arrangements were and I didn't ask him.

Q. Did you have any conversation with Mr. Rogers in which any contingent fee in this case was mentioned by Mr. Rogers?

A. No. Mr. Rogers never told me anything about his personal arrangements or what arrange-

(Testimony of David E. Peckinpah.)

ments he made with Mr. Curran. He made a perfectly business-like arrangement with me and that's all I know about it. I haven't the slightest idea whether it is contingent or otherwise.

Q. Would you say to the court what in your opinion are the customary, reasonable trial charges of a good trial attorney like yourself before a jury, daily?

A. Well, it varies from one to one hundred fifty dollars a day with a retainer fee for the first day's trial for \$150 to \$250. I [49] might say that I fixed the first day at \$150, because Mr. Frank Curran was in the case and was a very prominent trial lawyer, and I felt that under the circumstances it would be easier work, and that it was proper to cut down the first day. Ordinarily the charge for the first day, the familiarizing yourself with the case, the first day's trial is \$250, and then depending on the type of case it is and whether you are before a jury or a court, the per diem runs from \$75 to \$150 ordinarily.

Q. What is the customary, reasonable charge for a first class attorney in the preparation of a jury trial such as this case, Campbell vs. Rustigan?

A. That depends entirely on the time taken, the difficulty in interviewing the witnesses. For instance, if you have to use an interpreter if it is hard to understand them, the distance you have to travel to investigate your case, and it can run from \$250 to \$300 to \$1,000. For instance, there was one case that I traveled all over the State of Cali-

(Testimony of David E. Peckinpah.)

fornia and part of Nevada. My charges were \$1500 for preparation alone on that case. That depends entirely on the time that is necessary to put in. There are some cases, take negligence cases, where you might only have to use a half a day to get all of the interviews that you need and to investigate the scene of the accident. There are other cases where it might take a day, two or three days or a week, depending on location and facts, so that that is a hard question to answer.

Q. Well, isn't it customary for a first class attorney in [50] Fresno to charge about \$50 a day for preparing a case?

A. Well, I wouldn't say. No customary charge for a first-class attorney. I would say that perhaps on the defense of negligence cases, it runs \$75 a day. Perhaps with insurance companies where they have lots of cases and they have an agreement, it would be \$50, but I don't think that under any circumstances a first-class attorney charges less than \$75 a day for the preparation of a case, and I say again that all depends on the case, the amount involved, the importance of it, and what you have to do.

Q. The trial of this particular case of Campbell vs. Rustigian lasted three days, did it not?

A. Three days.

Q. In the Superior Court in Madera County?

A. It was a difficult case to try.

Q. And Mr. Curran tried the case with the exception of a few questions asked the present con-

(Testimony of David E. Peckinpah.)

ciliation commissioner, Mr. McDowell, by Mr. Rogers, did you not?

A. Well, the bulk of the case was tried by Mr. Curran and myself. We examined practically all of the witnesses. Mr. Rogers handled, I think, two witnesses. No, I think he handled three. I am not sure about that, two or three.

Q. And you and Mr. Curran questioned the jury, did you not? A. Yes.

Q. Examined the jury?

A. We were in consultation with Mr. Rogers all the time.

Q. And you and Mr. Curran gave the opening and closing address to the jury?

A. That is right. [51]

Q. And Mr. Rogers?

A. You should have been there.

Q. Mr. Rogers didn't participate in that?

A. No.

Q. Did Mr. Curran do any more of the examination of witnesses or questioning of jurors than yourself?

A. No. I think probably about even. We took the jurors off and on alternatively and the witnesses just about the same way. I think Mr. Curran did more of the direct examination, and I did more of the cross-examination, if I remember it correctly.

Q. And that applies to the argument to the jury, too?

A. Well, Mr. Curran wasn't feeling very well

(Testimony of David E. Peckinpah.)

at the time so he opened and asked me to take the burden and most of the time on the closing argument.

Q. In your opinion, if there is one attorney trying a case like that, questioning the witnesses, the jurors and delivering the argument, would he not be entitled to a higher compensation than if there are two or three attorneys?

A. No, I don't think so, because if counsel who doesn't participate in the actual trial has done the required work in marshalling facts, getting them in order so that they are easily digested by the trial lawyer and has his law prepared in order to allow the trial lawyer to present the case in a sane and sensible way, his work is just as important in its way as the trial lawyer's work, and this case was big enough and important enough to merit the attention of three counsel, I am sure.

Q. In your opinion, does the fact that your client was a bankrupt, would that have any effect on the size of the fee [52] in this particular case or should it have any effect?

A. Yes, I think that has to be taken into consideration, and I assume that Mr. Rogers has taken that into consideration in asking for the low fee that has been asked for in this case. This case justified a much larger fee if the people weren't bankrupt. I don't think there is a counsel in this court room that would consider taking this case, the defense of this case for that kind of a fee under other circumstances.

(Testimony of David E. Peckinpah.)

Q. Would the fact that a new trial was granted tend to lessen the total value of the services of the three lawyers in your opinion in this case?

A. Well, I can't answer that until the time comes that we know what the ultimate outcome of the case is. At the present time, no, positively no. The results are still very beneficial for the defendants. In the end, possibly, but we haven't reached that, and that would only be an opinion. I don't think at the present time that the fees are based upon any ultimate outcome anyway.

Q. At the present time there is an appeal pending in the case of Campbell vs. Rustigian?

A. I understand there is. I am not sure. You will have to ask Mr. Rogers and Mr. Goldstein about that. I am not sure whether an appeal is pending or not.

Q. And in the event an appeal is denied, there will be another trial?

A. There will be another trial.

Q. And have you any estimate as to the reasonableness of fees for the present counsel for the defendants in the appellate courts? [53]

(Objection. Objection sustained.)

Mr. Rowe: That's all.

Mr. Rogers: We rest.

DAVID E. PECKINPAH

called as a witness and being heretofore duly sworn, testified further as follows:

Mr. Schnabel: You are already sworn, Mr. Peckinpah?

A. Yes.

Q. How many hours did you spend in the preparation of the work and presentation, how many hours altogether? A. In the trial, too?

Q. In the trial, too.

The Conciliator: If you want a piece of paper and time to figure it out——

Mr. Schnabel: Q. Didn't you keep an office hour record?

A. I could tell you approximately.

Q. A fair approximation is all right. Your professional statement of an approximation is good enough for me.

A. I'd say probably 40 hours.

Q. 40 hours. And that was office work including preparation, conferences, and examination of the law? A. Yes.

Q. Now, how many hours did you spend in court? A. I spent three days.

Q. Three days in court? A. Yes.

Q. Now, were your 40 hours included in your computation—now, were the three days included in your computation of 40 [54] hours or were they separate?

A. I didn't spend 35 hours in court. Actual hours from 10 to 12 and usually from 2 to 5. You

(Testimony of David E. Peckinpah.)

interview witnesses over time and during your recesses and so forth.

Q. Shall we say 15 hours in court?

A. Well, it would really be more. Fifteen hours of trial work, but, of course, you get there early and you talk to witnesses and you have conferences after hours with your associate counsel, but actual trial work fifteen hours, I would say, perhaps we had better make that about 18 hours. I think we went a little overtime on the last day.

Q. Eighteen hours and how many hours again in the office?

A. In the office, well, I'd have to look it up. I would have to guess now.

Q. What is your best approximation?

A. My best approximation would be 35 to 40 hours.

Q. Mr. Peckinpah, did you obtain an order from this court or from the United States District Court to do work for these bankrupts or for this bankruptcy estate?

Mr. Rogers: Just a minute. I object to that on the ground it is not the best evidence. If there is an order it is in writing, and that is the best evidence. As a matter of fact, we will stipulate there wasn't any order made.

Mr. Schnabel: I accept the stipulation.

Q. Did you prepare or have prepared in your office a petition for your employment to be signed by these bankrupts or either of them?

A. I didn't, no, sir. [55]

(Testimony of David E. Peckinpah.)

Mr. Schnabel: Mr. Rogers, will you stipulate with me that no order was obtained or filed on Mr. Peckinpah's behalf, on your behalf or on the behalf of Mr. Curran?

Mr. Rogers: There was no written order or petition made. There was a verbal discussion by the court is all.

Mr. Schnabel: Will you so stipulate?

Mr. Rogers: Yes.

Mr. Schnabel: I accept the stipulation.

Q. Now, Mr. Peckinpah, the trial was in Madera and, of course, you had to drive up there?

A. That is right.

Q. And you made two trips a day for three days? A. That is right.

Q. Did you have to do any other out-of-town investigation? A. On this case?

Q. Yes. A. No.

Q. And you have given us a substantial picture of the amount of work which you did in the trial and preparation of this case and in the investigation of the evidence which is that you spent approximately 15 hours in court, 15 to 18, and approximately 35 to 40 hours in the office?

A. Yes. That is just a guess. My office records will show the trial work by day, not by hours. The investigation will show by hours.

Q. This, however, is a fair approximation?

A. I think a fair approximation. I never count a trial day by the hour because sometimes you

(Testimony of David E. Peckinpah.)

start at 9.30 and end at 5. Sometimes you start at 10 and end at 4.

Q. Now, Mr. Peckinpah, keeping in mind that you are here [56] today to support the propriety and reasonableness for a petition for attorney fees, does this evidence just produced satisfy you as to the amount of work you did? A. Oh, yes.

Mr. Schnabel: Mr. Goldstein.

MATT GOLDSTEIN

called as a witness, and being heretofore duly sworn, testified further as follows:

Mr. Schnabel: Q. Mr. Goldstein, you were the office associate of Mr. Curran?

A. That is correct.

Q. Were you an employee or did you have a partnership or did you have what we call an office arrangement?

A. It was an office arrangement, an association.

Q. I see. Did you assist Mr. Curran in the preparation of this litigation for trial?

A. I did.

Q. I see you have no petition for attorney fee before the court at this time?

A. No, I have not asked for any, because Mr. Curran was the principal in this case, and merely asked me to do some of the work which he normally would have done.

(Testimony of Matt Goldstein.)

Q. You looked to him for your compensation?

A. To his estate.

Q. I see. Are you familiar with Mr. Curran's work in this case?

A. Well, I am familiar——

Q. Of your own knowledge, Mr. Goldstein?

A. Yes. A considerable part of it. [57]

Q. What part of it?

A. Well, he and I discussed the case together a number of times.

Q. Was that conversation or was it actual discussion, shall we say intellectual calisthenics with reference to trying the case?

A. It certainly had as its purpose the preparation of the successful trial of this case.

Q. Loose conversation, if I may put it that way.

A. It was a serious analysis of the pleadings and analysis of the law. I looked up a great many cases.

Q. Let me interrupt. Not what you did, since you look to Mr. Curran for compensation, but primarily what Mr. Curran did of your own knowledge.

A. I would look up cases and would digest what, in my opinion, was the law and then I would take it up and discuss it with him in order to fit the cases in the jigsaw puzzle.

Q. Did you do most of the work yourself?

A. As I say I would look up the law, and I

(Testimony of Matt Goldstein.)

would come into his office with my notes and we would discuss the law as applicable to the case.

Q. As you had discovered it?

A. As I had discovered it. And Mr. Curran asked me to prepare the instructions. I discussed those with him after they were prepared, so that when we worked, it was a joint venture so to speak. Both of us were working together in the preparation of this case.

Q. Do you know to whom Mr. Curran looked for compensation?

A. Yes, I do. He had his arrangement with Mr. Rogers.

Q. Do you know what that arrangement was of your own knowl- [58] edge?

A. I do not of my own knowledge.

Q. How many hours did Mr. Curran spend in the office in the preparation of this case of your own knowledge?

A. Well, for almost the better part of two weeks before the trial, Mr. Curran was busy with this file in this case. We had the file in our office during that time most of the time. There were times when we took it to Peckinpah, but primarily it was in Mr. Roger's office or our office.

Q. What were you doing for two weeks?

A. He was digesting the evidence. It was rather a massive file. He was conferring with Mr. Rogers regarding the witnesses. I know Mr. Peckinpah was there once or twice while I was there, and also we were giving a great deal of consideration to one

(Testimony of Matt Goldstein.)

—what we regarded as one very important question, that is how much evidence would be admissible on the state of these pleadings at the trial of this case. That occupied a great deal of our time, because we felt that the limitation of proof in view of the nature of the pleadings would be one of the principle issues that would have to be argued before the court.

Q. Now, to get back to this matter of hours, how many hours would you say?

A. I would say the better part of two weeks.

Q. The better part of two weeks. Five days a week or six days a week or seven?

A. Well, Mr. Curran almost lived at the office when he got ready to try a case.

Q. I see. Now, of this period spent in the office what [59] percentage would you compute to be your contribution?

A. I have never given that any thought.

Q. Did you work for two weeks, too, with him?

A. No. I was busy preparing another case for trial.

Q. But from time to time you would come in on the case when Mr. Curran wanted you to assist in the preparation of the law?

A. That is right.

Q. Mr. Curran of your own knowledge attended the trial for three days with these other gentlemen?

A. That is correct.

Mr. Schnabel: That's all. Thank you. Mr. Rogers.

FRED J. ROGERS,

called as a witness, and being first duly sworn, testified as follows:

Mr. Schnabel: Q. Mr. Rogers, I understand that you represent the bankrupt in this proceedings, is that correct? A. That's true.

Q. And you have before the court at this time a petition for attorney fees for three attorneys, yourself, Mr. Frank Curran and Mr. David Peckinpah, is that correct? A. True.

Q. And this petition is predicated upon alleged services granted the bankrupts, is that correct?

A. That is true.

Q. And their—— A. And their estate.

Q. And their estate. Do you intend to amend your petition to include alleged services to the estate or do you intend to rely upon it in its present status?

A. That remains to be seen. I am standing on it at the present time. [60]

Q. Thank you. Did you at any time obtain from the bankrupts or either of them a verified petition stating the name of the counsel whom they wished to employ, the necessity for the employment, the amount of time to be consumed in the anticipated employment and the nature of the professional services to be rendered?

A. Only the petition filed in this court, I would say about December '41.

Q. And will you show that to me in the court's record please?

(Discussion off the record.)

(Testimony of Fred J. Rogers.)

A. The 23rd of December, 1941, it was sworn to.

Mr. Schnabel: If the Court please, I don't believe it is material anyway.

The Conciliator: Just a minute. I would like to find it. It was filed on February the 7th, 1942. Would you like to look at it?

Mr. Schnabel: No, your Honor, I discovered it was filed after the institution of these proceedings.

Q. Now, Mr. Rogers, that's the petition which Mr. McDowell has just identified as having been filed?

A. I haven't seen it. You didn't show me.

Q. I assumed you knew about it. You prepared and filed it.

A. That is not the one I am referring to. Yes, it is, too.

Q. Now, Mr. Rogers, I understand then that the debtors did not at any time petition this court for an order authorizing the employment of you nor Mr. Peckinpah nor Mr. Curran, is [61] that right?

A. They didn't in writing, but they did verbally.

Q. Thank you. Now, did you present to the court a petition for an order authorizing the employment of you as an attorney for the bankruptcy estate or for the bankrupts or either of them?

A. With the exception of that one of February '42 and also explaining the matter verbally——

Q. Just a moment, please. This purports to be a petition for attorney fees, not appointment of an

(Testimony of Fred J. Rogers.)

attorney. Understand me, I am asking you if you obtained from this court an order for your employment as an attorney for these bankrupts or either of them? A. Yes, I did.

Q. Or for the bankruptcy estate?

A. Yes.

Q. Now, will you tell me the date of the order so I may look for it in the file?

A. I looked for it in vain the other day. The date, I am not sure. I take it when this petition we are referring to came up for hearing the Court made an order granting me that amount of money for past services up to that time, and approved my employment as an attorney in this case, and I got the money.

Q. I see. But outside of this order authorizing payment to you of the sum of \$750, there was no order authorizing the employment for which this was compensation, is that correct?

A. No written order.

Q. That's all. Now, for the purpose of identification, may we say that the petition for order of payment on account of counsel fees by within debtors is the petition you now refer [62] to?

A. That is the one on record.

The Conciliator: There is two on record.

A. The one I am referring to is the one filed in February of '42, is the one I am referring to.

The Conciliator: What is the date of the filing, Mr. Rowe? February the 7th, wasn't it?

Mr. Rowe: 7th.

(Testimony of Fred J. Rogers.)

The Conciliator: February the 7th, '42. That is the first petition again. That is right.

Mr. Schnabel: Q. Was there an order made and entered by this court for the employment of Mr. Peckinpah?

A. I believe there was a verbal order made.

Q. I won't ask if it was entered. And Mr. Curran? A. Same thing.

Q. Same thing. Now, what was the purport of that verbal order and when was it allegedly entered into?

A. Well, I would say 30 days before this trial, the superior court trial we referred to. I took it up with Mr. McDowell the matter of getting into the record their employment, their association in the trial of the case.

Q. And who was present at this conference?

A. Mr. McDowell and myself.

Q. Just the two of you? A. Yes.

Q. Was Mr. Young advised of this conference?

A. No. We didn't notify Mr. Young.

Q. Was Mr. Rowe notified of this conference?

A. Not to my knowledge. [63]

Q. You know at that time that they were attorneys for E. W. Campbell and the Security-First National Bank at that time?

A. I didn't know whether Mr. Young was.

Q. Was Mr. Backlund present? A. No.

Q. Was he notified of this conference?

A. Not to my knowledge.

Q. Or Mr. Barbour? A. No.

(Testimony of Fred J. Rogers.)

Q. Was any notice given to anybody about this conference concerning the purported oral order authorizing the employment?

A. Not that I know of.

Q. You would have given it normally if any had been given? A. Probably.

Q. As a matter of fact, it was an office conference, was it not?

A. No, I went down especially to see Mr. McDowell about the matter, the trial coming up. I made special arrangements with these men. I figured we were going to do a lot of work in the trial of it, and they relied upon my discussions and arrangement that they would be adequately compensated, and they went ahead and did their best.

Q. Now, for the purpose of the record, does the Court recall this conference and what orders, if any, were entered as its aftermath?

The Conciliator: Well, only to this extent that at that time I explained to Mr. Rogers that there would be only one attorney's fee paid, and this court wouldn't make any arrangements as to its amount, character or anything of that character, only that it would allow what was shown on a [64] petition as to knowledge exercised and responsibility assumed and work done.

Mr. Schnabel: In other words, the substance of the conversation was simply at an appropriate time the Court would take up the matter of the allowance of court fees and would allow what in his opinion was proper under the law?

(Testimony of Fred J. Rogers.)

The Conciliator: That is right.

Mr. Schnabel: And there was no order authorizing the employment of these men and guaranteeing to pay them any stipulated amount?

The Conciliator: That is correct.

A. Just a minute, if I may interrupt. It is my recollection that at that time I was advised and told that there would be no question if these men joined with me and went in on the case, that they would be taken care of either through me or separately or some way in the matter.

Mr. Schnabel: Excuse me. Now, I don't intend to institute any argument between the bench and the witness here, but I feel that for the purpose of clarity we should know whether or not any oral order was made employing these men and guaranteeing to pay them any amount. Now, the Court has answered to the best of its ability, and I feel that the record will amply show that.

The Conciliator: Well, Mr. Rogers did tell me who he was going to employ. As to the amount to be paid, there was no discussion. We didn't consider such discussion, but as to the gentlemen who were going to be employed, I assured him [65] that the check would have to be drawn in one—I didn't intend to break up any check.

Mr. Schnabel: I see.

The Conciliator: But I did tell him that also he was justified in going ahead and getting them to help him.

(Testimony of Fred J. Rogers.)

Mr. Rowe: May I ask that both the statement of Mr. Rogers and the conciliator with your approval be stricken on the ground that they are incompetent, irrelevant and immaterial. It was no legal proceeding of the court or of the conciliation commissioner and from the testimony there was no legal order made and what the conciliation commissioner might have stated to Mr. Rogers as to what the law was clearly would be irrelevant and incompetent at this hearing.

(Objection overruled.)

Mr. Schnabel: With the understanding, of course, that whatever the legal significance of those circumstances, it will be taken into consideration by the court as we develop the law on the point.

The Conciliator: All right.

Mr. Schnabel: Is that satisfactory to you, Mr. Rogers?

A. I will answer any questions. Are you addressing me as a witness or counsel?

Mr. Schnabel: You are back in your roll as counsel.

Mr. Rogers: I am not going to stipulate to anything at this time.

Mr. Schnabel: Q. Now, Mr. Rogers there have been certain funds from the proceeds of the crop on this land in dispute in the [66] quite title action impounded in this court, is that true?

A. I haven't examined the court's record as to the impounding of money. I haven't had anything to do with the impounding of it. I couldn't say.

(Testimony of Fred J. Rogers.)

Q. Yes.

Mr. Schnabel: Off the record. Mr. McDowell, I would like to find out how much money there is on hand sometime during these proceedings and we would like to have it in the record, if we may do that.

The Conciliator: Oh, yes.

Mr. Schnabel: Fine. Thank you. And, Miss Aynesworth, I hope you won't let me overlook it before we get out of here.

The Conciliator: Fine.

Mr. Schnabel: Q. Now, Mr. Rogers, prior to the date of adjudication, in other words, the amendment of these proceedings, had you been employed by these debtors or either of them? A. I had.

Q. You had been. And for how long a period prior to that time?

A. Well, I was employed by them when I drew up their schedule and petition to come under the act.

Q. Yes. The original petition under 8 OR, isn't that correct? A. Yes.

Q. Now, even before the proceedings were instituted in this court, they came to you?

A. They naturally came before they were *sign*.

Q. Now, directing your attention to a period four months prior to the institution of the proceedings, and ask you to [67] tell me during that period of time what fees, if any, were paid you by the bankrupts or either of them? A. Not a cent.

Q. Now, I direct your attention to a period of

(Testimony of Fred J. Rogers.)

time existing between the original petition under section 75A to 475S, and ask you what fees were paid to you by the bankrupt or either of them during that period of time? A. None.

Q. Now, drawing your attention to the payment of \$750 made to you in February of this year from the assets of this bankruptcy estate—correct me, if that is not the right date.

A. Well, the record shows the date. I don't remember the date.

The Conciliator: The order was made on February the 26th, 1942.

Mr. Schnabel: And the disbursement was made some reasonable time after that?

The Conciliator: Oh, yes, sometime after that.

Mr. Schnabel: Calling your attention to that figure, have you received at any time from the bankrupts or either of them any sums other than the \$750?

A. No, I didn't receive the \$750 on the attorney fees either.

Q. That amount has not been paid you yet?

A. That represented \$250 they owed me for costs advanced.

Q. In other words, you are saying that \$750 was the amount you got, but \$250 of that sum were your out-of-pocket expenses on their behalf?

A. That is right.

Q. But you did receive \$500 of that net, free and clear as [68] fees? A. That is right.

Q. Now, do you of your own knowledge know

(Testimony of Fred J. Rogers.)

whether the bankrupts or either of them at any time have paid Mr. Peckinpah or Mr. Curran anything?

A. I know they have not.

Q. Did anybody on behalf of the bankrupts or either of them pay you anything?

A. Not that I know of, no.

Q. You would know, if they had?

A. Certainly would.

Q. And so no one has paid you anything with the exception of the \$750 allowed by this court sometime in February of this year in these bankruptcy proceedings?

A. That is right.

Q. And that is the only amount paid to any attorney in these bankruptcy proceedings?

A. As far as I know.

Q. Did Harry Rustigian pay you anything?

A. Nothing.

Q. Thank you. Now, Mr. Rogers, in fairness to you, I want to ask you how many hours you put in.

The Conciliator: There is one thing I would like to call your attention right here, that in all these petitions, I mean these petitions that the bank has filed, they use the phraseology, as I see it, that this \$750 was for future services. That isn't according to the order. The order was the proceedings in the sum of \$750—wait a minute.

A. Services heretofore rendered.

The Conciliator: In other words, the \$750 was for services heretofore rendered.

(Testimony of Fred J. Rogers.)

Mr. Rowe: But the petition asked for services to be rendered.

The Conciliator: That is right, and I didn't grant it.

Mr. Schnabel: And when you granted the petition, we assumed [69] that that had been for both.

The Conciliator: I wouldn't grant that. I only granted for services previously rendered.

Mr. Schnabel: In other words, the money the court granted was for what Mr. Rogers had done up to that time and for costs?

The Conciliator: In other words, I noticed that in both yours and Mr. Rowe's petition you used that phraseology. I wanted you to understand that the order was for services previously rendered and not for services to be rendered.

Mr. Schnabel: Q. Now, Mr. Rogers, how many hours did you put in representing the Rustigians in your office, investigation and in your trial time in the action *E. B. Campbell vs. Myron and Hagoochi Rustigian* in the Superior Court of Madera County?

A. Well, that would be hard to say in hours, but I can tell you in a general way what I did. I drew all of the pleadings in the case filed by the defendants or either of them. I interviewed all of their witnesses. I spent at least five nights before the trial from 7 o'clock until midnight at a certain place out here in Fresno interviewing the two debtors. One reason for that being that Myron Rustigian had a skull injury and his mentality was in-

(Testimony of Fred J. Rogers.)

jured, and it was very difficult to make him a witness, a understandable witness, and I spent a great deal of time with him, and I think I examined him in the trial as well as three or four other witnesses, and then they were in my office, of course, many times, and to say how many hours I [70] would hesitate to say, but I would say I put in at least ten days, that is, working days' time before the trial of that case.

Q. Now, did the ten days include the three days in trial?

A. Well, steady time I would think that probably ten days would cover all of my time if I did nothing else.

Q. One little matter I overlooked. Did you represent any member of the Rustigian family any time before the institution of these bankruptcy proceedings?

A. What do you mean by Rustigian family?

Q. I mean did you ever represent Harry Rustigian in any matter?

A. I had previously some years before, yes.

Q. I see. As a matter of fact, your representation was in the matter of buying this very property for him now in dispute in the Superior Court?

A. I never had anything to do with buying this property for Harry Rustigian.

Mr. Schnabel: Do you want to cross-examine, Mr. Rogers?

Mr. Rogers: I will waive that.

(Testimony of Fred J. Rogers.)

Mr. Schnabel: Mr. Peckinpah, do you want to ask your co-counsel anything?

Mr. Peckinpah: I will waive that.

[Endorsed]: Filed Dec. 17, 1942. Herbert McDowell, Referee, by Helene McDowell, Clerk.

[Endorsed]: Filed Apr. 20, 1943. Edmund L. Smith, Clerk, by R. B. Clifton, Deputy Clerk. [71]

[Title of District Court and Cause.]

NOTICE OF HEARING PETITION TO RE-
VIEW ORDERS OF CONCILIATION COM-
MISSIONER

To: Miron Rustigian and Hagoochi Rustigian, debtors above named, and to the Honorable Herbert McDowell, Conciliation Commissioner for Fresno County, and Messrs. Fred J. Rogers, Matt Goldstein, David E. Peckinpah and Claude L. Rowe, Attorneys at Law:

You and each of you will please take notice that on Saturday, June 5, 1943, at the hour of ten o'clock a. m., or as soon thereafter as counsel can be heard, in the Federal Building, Fresno, California, the Petition of Bank of America National Trust and Savings Association to review certain orders heretofore made in the above entitled proceedings by the Honorable Herbert McDowell, Conciliation Commissioner for Fresno County, will be

heard before the Honorable Leon R. Yankwich, Judge of the United States District Court for the Southern District of California.

Dated this 26th day of May, 1943.

EDMUND NELSON

DANIEL I. SCHNABEL

Attorneys for Bank of America National Trust and Savings Association. [72]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of California,
County of Los Angeles—ss.

F. R. Thayer, on oath says: I am a citizen of the United States and a resident of said County. I am over the age of eighteen years and not a party to the above entitled proceeding. My business address is 650 South Spring Street, Los Angeles, California. On the 26th day of May, 1943, I served the attached Notice of Hearing Petition to Review Orders of Conciliation Commissioner, on the debtors above named, on the Honorable Herbert McDowell, Conciliation Commissioner for Fresno County, and upon Attorneys Fred J. Rogers, Matt Goldstein, David E. Peckinpah and Claude L. Rowe, by putting a true copy thereof enclosed in each of six sealed envelopes, addressed as follows:

Miron Rustigian and Hagoohi Rustigian, care
Fred J. Rogers, Attorney at Law, Pacific
Southwest Bldg., Fresno, California;

Honorable Herbert McDowell, Conciliation
Commissioner, 516 Pacific-Southwest Bldg.,
Fresno, California;

Fred J. Rogers, Esq., Pacific Southwest
Bldg., Fresno, California,

Matt Goldstein, Esq., Brix Building, Fresno,
California,

David E. Peckinpah, Esq., Brix Bldg., Fresno,
California,

Claude L. Rowe, Esq., City Attorney, Pacific-
Southwest Bldg., Fresno, California,

and depositing said envelopes in the postoffice at
Los Angeles, California, with postage thereon fully
prepaid. There is regular [73] communication by
mail between the place of mailing and the places
so addressed.

F. R. THAYER

Subscribed and sworn to before me this 26th day
of May, 1943.

M. CUPP

Notary Public in and for said County and State.

[Endorsed]: Filed May 26, 1942. [74]

[Title of District Court and Cause.]

OPINION ON PETITION FOR REVIEW

Appearances:

For the Petitioner:

Daniel I. Schnabel,
Los Angeles, Calif.

For the Debtors:

Fred J. Rogers,
Matt Goldstein,
Fresno, California. [75]

Yankwich, District Judge:

On May 18, 1940, Miron Rustigian and Hagoohi Rustigian, his wife, debtors herein, filed their petition under Section 75 of the Bankruptcy Act of 1938, claiming to be farmers and listing as real property one hundred acres of farm land in Madera County, California. On August 23, 1940, they filed an amended petition under Section 75(s), and were adjudicated bankrupts. On July 21, 1941, E. B. Campbell petitioned this court for leave to institute action against the debtors and the bankrupt estate to quiet title to the farming property claimed by he debtors. Campbell based his claim upon an execution sale held on May 24, 1940, under a judgment obtained against one Harry Rustigian in the City and County of San Francisco. Permission to institute such action was granted on July 21, 1941, and the Conciliation Commissioner was directed to

appoint a trustee for the bankrupt estate to represent it and "accept service of pleadings" in the litigation. On November 10, 1941, the order was amended by eliminating from it the direction to the Conciliation Commissioner of Madera County to appoint a trustee. Campbell instituted action in the Superior Court of California, for Madera County to appoint a trustee. Campbell instituted action in the Superior Court of California, for Madera County, on November 27, 1941. After issue joined, the cause was tried before the court with a jury and on November 29, 1942, the jury rendered a verdict in favor of the debtors. Thereafter the court granted a new trial, from which order an appeal is pending. During the pendency of these proceedings, the Conciliation [76] Commissioner made two orders awarding Fred J. Rogers attorney's fees for services rendered as attorney for the debtor. The first order was dated February 25, 1942, and awarded him the sum of \$750.00 as attorney's fees, without notice to anyone. The second order was dated November 25, 1942. It was preceded by a petition which sought the sum of \$1500.00 for the services of Frank Curran, David Peckinpah and Fred J. Rogers in the defense of the state action. Objections to the petition were filed by the Security-First National Bank of Los Angeles as secured creditor and the Bank of America National Trust and Savings Association, successor in interest and assignee of E. B. Campbell. A hearing was had upon the petition and objections. On November 25, 1942, the Conciliation Commis-

sioner entered an order for the payment of the sum asked for to Fred J. Rogers alone, for \$1500.00. The money was paid to him on the same day. Up for review are the two orders, on the petition of the Bank of America National Trust and Savings Association, the other objector, the Security-First National Bank of Los Angeles, not having petitioned for review.

The debtors dispute the right of the petitioning bank to challenge the two orders. The bank was a claimant of the farming property of the debtor. Permission to institute action in the state courts to enforce its claim was granted by this court. He who claims the property of a debtor has a "controversy in bankruptcy". (Bankruptcy Act, Sec. 24; *Hewit v. Berlin Machinery Works*, 1904, 194 U. S. 296; *Gibbons v. Goldsmith*, 1915, 9 Cir., 222 Fed. 826) Consequently, although the [77] claim in this case was asserted in a state court, such claimant is adversely affected by an order allowing attorney's fees, which can only be paid from the income of the property which he claims.

The bank's review may, therefore, be entertained.

Coming now to the merits. The order of the Conciliation Commissioner entered on February 25, 1942, awarding Fred J. Rogers the sum of \$750.00 as attorney's fees, cannot be reviewed now. The order was made *ex parte*. And, while, as will appear further on, it was illegal, it cannot be challenged in the absence of a motion addressed to the Commissioner to vacate it. This seems to be the established rule in this and other circuits as to such

orders. (See 8 Remington on Bankruptcy, 5th Ed., Sec. 3703; *In re Snyder*, 9 Cir., 1925, 4 F(2) 627; *In re Retail Chemists Corp.*, 2 Cir., 1933, 66 F(2) 605, 607)

Considering the order of the Conciliation Commissioner dated November 25, 1942, and which allowed Fred J. Rogers, attorney for the bankrupt, the sum of \$1500.00 as attorney's fees, we must bear in mind the general rule that fees of attorneys for a debtor in bankruptcy are limited strictly to services rendered before bankruptcy in preparing the petition and schedules. Services rendered by such attorney after bankruptcy are compensable only in beneficial to the estate. I had occasion to treat this topic very fully in two opinions (See: *In re Owl Drug Co.*, D. C. Nev. 1936, 16 Fed Sup 139, 145, 146; *In re Charles Ray Glass*, D. C. Cal., 1942, 47 Fed Sup 428), so I will not repeat what is said there. The absence of findings of fact and conclusions [78] of law as to this order, which is apparent on the face of the certificate, makes it invalid. The order made upon notice and after the filing of a petition and objections and, after the taking of testimony,—was a trial “upon the facts”, which required findings of fact and conclusions of law. Without them the order cannot stand. (See Order 37, General Orders in Bankruptcy; Rule 52(a) of Federal Rules of Civil Procedure; *Perry v. Bauman*, 9 Cir., 1941, 122 F(2) 409; *Estate of Rendell*, 1932, 216 Cal. 384; *Diamond v. Grath*, 1941, 46 C. A. (2) 443, 447) However, assuming that this might be corrected, as suggested

by the debtor, by reversing the order and sending it back to the Conciliation Commissioner for further proceedings, such disposition of the matter would be helpful only if the order were otherwise valid. But the order is unquestionably invalid, and cannot be legalized by findings, as it was an allowance of attorney's fees made to the attorney employed by the debtor without an order of court authorizing such employment as required by General Order 44, which makes such order upon a verified petition, the condition precedent to the employment of attorneys for a debtor in possession. While the inclusion of attorneys for debtors in possession in this Order is new, the order is of long standing. And courts have held repeatedly that failure to comply with it renders the payment of attorney's fees invalid, even when the services have benefited the estate. (See: *Weil v. Neary*, 1929, 278 U. S. 160; *In re Eureka Upholstering Co.*, 2 Cir., 1931, 48 F(2) 95; *In re Rogers-Pyatt Shellac Co.* 2 Cir., 1931, 51 F(2) 988; *In re Progress Lektro Shave Corp.* 2 Cir., 1941, 117 F(2) 602; *Albers v. Dickinson*, 8 Cir., 1942, [79] 127 F(2) 957, 961) The attempt of the Conciliation Commissioner and the debtor to justify the allowance under Subdivision 1 of Section 64(a)(1) of the Bankruptcy Act of 1938, which gives priority to "the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition", finds no justification in the law. This subdivision was Section 64(1) of the old Bankruptcy Act. It has never been interpreted to apply to fees for

unauthorized attorneys of a debtor, employed in litigation to preserve the debtor's title to property in his possession, title to which he claims. All authorities agree that the clause refers simply to physical acts of preservation of the property by caretakers and others. (See: Gilbert's Collier on Bankruptcy, 4th Ed. Section 1304; 6 Remington on Bankruptcy, 4th Ed., Secs. 2634, 2635; and see *In re Mitchell*, 2 Cir., 1914, 212 Fed 932)

Hence the following ruling:

The Order of the Conciliation Commissioner, dated February 25, 1942, is affirmed.

The Order of the Conciliation Commissioner, dated November 25, 1942, is reversed, and the attorney for the debtor, Fred J. Rogers, is hereby ordered, within ten days from the date hereof, to repay to the estate the sum of \$1500.00.

Dated this 23rd day of July, 1943.

LEON R. YANKWICH,

United States District Judge.

[Endorsed]: Filed July 23, 1943. [80]

[Title of District Court and Cause.]

ORDER ON PETITION FOR REVIEW

The petition of the Bank of America National Trust & Savings Association to review the order of the Conciliation Commissioner dated February 25, 1942, allowing Fred J. Rogers, attorney for the debtor, the sum of \$750.00 attorney's fees and

the order of the Conciliation Commissioner dated November 25, 1942, allowing Fred J. Rogers, attorney for the debtor, the sum of \$1500.00 attorney's fees, heretofore argued and submitted, is now decided as follows on the grounds set forth in the opinion this day filed:

The order of the Conciliation Commissioner dated February 25, 1942 is affirmed.

The order of the Conciliation Commissioner dated November 25, 1942, is reversed, and the attorney for the debtor, Fred J. Rogers, is hereby ordered, within ten days from date hereof, to repay to the estate the sum of \$1500.00.

Dated this 23rd day of July, 1943.

LEON R. YANKWICH,

United States District Judge.

Opinion filed.

Judgment entered Jul. 23, 1943.

Docketed Jul. 24, 1943.

Book C O 1 Page 690.

EDMUND L. SMITH,

Clerk.

By MARIUS E. CROSS.

[Endorsed]: Filed Jul. 23, 1943. [81]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that Fred J. Rogers, attorney for the bankrupts in possession above-named,

and Miron Rustigian and Hagoohi Rustigian, the bankrupts above-named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from that part of the Order made by Honorable Leon R. Yankwich, United States District Judge, on the 23rd day of July, 1943, and filed and entered in the office of the Clerk of said court on the 23rd day of July, 1943, wherein said order reverses the order of the Conciliation Commissioner dated November 25th, 1942, and directs the said Fred J. Rogers, attorney for the bankrupts, within 10 days of the date thereof to repay to the estate the sum of \$1,500.00.

No appeal is taken from that portion of the order of Honorable Leon R. Yankwich which affirms the order of the Conciliation Commissioner dated February 25th, 1942.

Dated August 20, 1943.

MATT GOLDSTEIN,

Attorney for Appellants, 406
Brix Building, Fresno 1,
California.

[Endorsed]: Filed Aug. 21, 1943. [82]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know all men by these presents, That we, Fred J. Rogers, Miron Rustigian and Hagoohi Rustigian, as principals, and Associated Indemnity Cor-

poration, as surety, are held and firmly bound unto the above-named Bank of America National Trust and Savings Association in the sum of \$250.00, for the payment of which, well and truly to be made, we bind ourselves, our administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 20th day of August, 1943.

Whereas, a certain order was entered herein on the 23rd day of July, 1943, in a certain proceeding wherein Bank of America National Trust and Savings Association was petitioner and Fred J. Rogers, Miron Rustigian and Hagoohi Rustigian were respondents, and the said Fred J. Rogers, Miron Rustigian and Hagoohi Rustigian did, on the 20th day of August, 1943, file notice of appeal from said order as required by law, and

Whereas, a bond for costs on appeal in the sum of \$250.00 is required by law to be filed with said notice,

Now, therefore, the condition of this obligation is such that if the said Fred J. Rogers, Miron Rustigian and Hagoohi Rustigian shall pay all costs which may be ordered if the said appeal is dismissed or the said order affirmed insofar as said order is appealed from, and such costs as the Appellate Court [83] may award if the said order is modified, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

Signed, sealed and delivered in the presence of
FRED J. ROGERS,
MIRON RUSTIGIAN,
HAGOOHI RUSTIGIAN,
Principals.

[Seal] ASSOCIATED INDEMNITY
CORPORATION.

By BEN DRENTH,
Attorney in Fact, Surety.

State of California,
County of Fresno—ss.

On this 20th day of August in the year one thousand nine hundred and forty-three before me W. O. Watters, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared Fred J. Rogers, Miron Rustigian and Hagoochi Rustigian, known to me to be the persons described in, whose names are subscribed to and who executed the within instrument, and acknowledged that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in said County, the day and year in this Certificate first above written.

[Seal] W. O. WATTERS,
Notary Public in and for said
County and State.

State of California,
County of Fresno—ss.

On this 20th day of August in the year one thousand nine hundred and forty-three before me, Mable Drenth, a Notary Public in and for said Fresno County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared Ben Drenth, known to me to be the Attorney in Fact of the

Associated Indemnity Corporation
the corporation described in and that executed the within and foregoing instrument, and known to me to be the person who executed the said instrument on behalf of the said corporation, and he duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said County of Fresno, the day and year in this certificate first above written.

[Seal] MABEL DRENTH,
Notary Public in and for the County of Fresno,
State of California.

My commission expires.....

[Endorsed]: Filed Aug. 21, 1943. [84]

[Title of District Court and Cause.]

NOTICE OF FILING OF NOTICE OF
APPEAL

To the Bank of America National Trust and Savings Association and to Daniel I. Schnabel and Edmund Nelson, Esqs., their attorneys:

Please take notice that on the 21 day of August, 1943, notice of appeal to the Circuit Court of Appeals for the Ninth Circuit and bond on appeal was filed by Fred J. Rogers, attorney for the bankrupts in possession, and Miron Rustigian and Hagoohi Rustigian, bankrupts in possession, from that part of a certain order entered on the 23rd day of July, 1943, in a certain proceeding wherein Bank of America National Trust and Savings Association was petitioner and Fred J. Rogers and Miron Rustigian and Hagoohi Rustigian were respondents, said appeal being taken only from said part of said order which reversed the order of the Conciliation Commissioner dated November 25th, 1942, and ordered Fred J. Rogers, attorney for the bankrupts in possession, within 10 days of the date of said order to repay the estate the sum of \$1,500.00.

Dated August 21, 1943.

EDMUND L. SMITH,

Clerk U. S. District Court,
Southern District of California.

By THEODORE HOCKE,

Deputy Clerk.

To: Daniel I. Schnabel and Edmund Nelson, Esqs.
Attorneys for Bank of America N. T. & S. A.

[85]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE
RECORD ON APPEAL

Upon reading and filing the annexed Affidavit of Matt Goldstein, duly verified the 22nd day of September, 1943, and on motion of Matt Goldstein, Esq., attorney for the appellants,

It Is Hereby Ordered that the time to file the record and docket the appeal in the above-entitled matter be and it hereby is extended to and including the 30th day of October, 1943.

Dated: Los Angeles, California, September 23, 1943.

LEON R. YANKWICH,

United States District Judge.

[86]

[Title of District Court and Cause.]

AFFIDAVIT OF MATT GOLDSTEIN

Southern District of California,
State of California,
County of Fresno.—ss.

Matt Goldstein, being duly sworn, deposes and says:

That he is the attorney for the appellants in the within appeal; that the time for the filing of the record and docketing of the appeal in the Circuit Court of Appeal will expire on the 30th day of September, 1943.

That the designation of the portions of the record and proceedings to be contained in the record on appeal were served upon the attorneys for the respondents on September 15th, 1943, and the time of the respondents to serve and file a counter-designation will expire on the 28th day of September, 1945.

That in view of the fact that it will require some time after the 28th of September, 1943, for the Clerk to prepare the record on appeal, it is respectfully asked that the time within which the said record on appeal may be filed in the Circuit Court of Appeal and docketed in that court may be extended thirty (30) days from September 30th, 1943, to-wit, to the 30th day of October, 1943.

That no previous application for an extension of

time to file the record and docket the appeal has been made to any court or judge.

MATT GOLDSTEIN

Subscribed and sworn to before me this 22nd day of September, 1943.

[Seal] CHARLOTTE VIETTY

Notary Public in and for said County and State.

[Endorsed]: Filed Sept. 23, 1943. [87]

[Title of District Court and Cause.]

DESIGNATION OF THE PORTIONS OF THE
RECORD, PROCEEDINGS AND EVIDENCE
TO BE CONTAINED IN THE
RECORD ON APPEAL

Now comes Miron Rustigian and Hagoohi Rustigian, the bankrupts, appellants herein, and designate the portions of the record and proceedings and evidence to be contained in the record on appeal as follows:

1. Petition for review of order of referee, including exhibits as follows:

A. Petition of Miron Rustigian and Hagoohi Rustigian, verified by Hagoohi Rustigian, verified by Hagoohi Rustigian on June 24th, 1942, for payment of attorney's fees.

B. Objections filed by Security First National Bank of Los Angeles, verified July 16th, 1942.

C. Objections filed by Bank of America N. T. & S. A., verified July 30th, 1942.

D. Testimony of Matt Goldstein, David E. Peckinpah and Fred J. Rogers given before the Referee on July 29th, 1942.

E. Affidavit of mailing dated July 6th, 1942.

F. Order made by Herbert McDowell, dated November 25th, 1942.

G. Petition for review filed by Bank of America N. T. & S. A., December 3rd, 1942.

H. Referee's certificate on review.

2. Notice of hearing to review orders of Conciliation Commissioner dated May 26th, 1943.

3. Order made by Honorable Leon R. Yankwich, July 23rd, 1943, [88] reversing order of Referee dated November 25th, 1942.

4. Opinion of Honorable Leon R. Yankwich, dated July 23rd, 1943.

5. Notice of appeal.

6. Bond on appeal.

7. Debtors' petition under section 75, Bankruptcy Act, filed May 18th, 1940.

8. Approval of debtors' petition and order of Referee under section 75, Bankruptcy Act dated May 18th, 1940.

9. Debtors' amended petition for adjudication as bankrupts under section 75-s, Bankruptcy Act, filed on or about August 23rd, 1940.

10. Order of adjudication of said bankrupts under section 75-s, dated August 23rd, 1940.

11. Clerk's notice of filing of notice of appeal.

12. Designation of portions of record, proceed-

ings and evidence to be contained in record on appeal.

Dated: September 15th, 1943.

MATT GOLDSTEIN

Attorney for Appellants

406 Brix Building

Fresno 1, California

[Endorsed]: Filed Sept. 10, 1943. [89]

AFFIDAVIT OF SERVICE BY MAIL

[C. C. P. 1013A]

(Must be attached to original or a
true copy of paper served.)

No. 5465

State of California

County of Fresno—ss.

Ruhamah McKinsey, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of Fresno County, and not a party to the within action.

That affiant's (business) address is 406 Brix Building, Fresno, California

That affiant served a copy of the attached Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal by placing said copy in an envelope addressed to Edmund Nelson and Daniel I. Schnabel, Esqs. at his office address 650 South Spring Street Los Angeles 14, California which envelope was then sealed

and postage fully prepaid thereon, and thereafter was on September 15th, 1943, deposited in the United States mail at Fresno, California

That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

RUHAMAH McKINSEY

Subscribed and sworn to before me on September 15th, 1943

[Seal]

CHARLOTTE VIETTY

Notary Public in and for said county and state.

[Endorsed]: Filed Sept. 10, 1943.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 89 inclusive contain full, true and correct copies of: Debtor's Petition in Proceedings under Section 75 of the Bankruptcy Act; Approval of Debtor's Petition and Order of Reference; Debtor's Amended Petition in Proceedings under Section 75 of the Bankruptcy Act; Adjudication, Order of Reference and Temporary Restraining Order; Referee's Certificate on Review; Petition for Order Permitting the Payment of Moneys for Attorneys' Fees; Objections of Security-First National Bank of Los Angeles, Secured

Creditor, to Petition for Order Permitting the Payment of Monies for Attorneys' Fees; Objections of Bank of America N. T. & S. A. to Petition for Order Permitting the Payment of Attorneys' Fees to Fred J. Rogers, Frank Curran and David Peckinpah; Order Permitting the Payment of Moneys on Account of Attorney Fees; Affidavit of Mailing Notice; Petition to Review Orders of Conciliation Commissioner; Reporter's Transcript of Rustigian Conciliation Hearing; Notice of Hearing Petition to Review Orders of Conciliation Commissioner; Opinion on Petition for Review; Order on Petition for Review; Notice of Appeal to Circuit Court of Appeals; Bond for Costs on Appeal; Notice of Filing of Notice of Appeal; Affidavit and Order Extending Time to File the Record and Docket the Appeal; and Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal which constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$34.25 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 27 day of October, 1943.

[Seal]

EDMUND L. SMITH, Clerk

By Theodore Hocke

Deputy Clerk

[Endorsed]: No. 10597. United States Circuit Court of Appeals for the Ninth Circuit. Fred J. Rogers, Miron Rustigian and Hagoochi Rustigian, Appellants, vs. Bank of America National Trust and Savings Association, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Filed October 28, 1943,

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Judicial Circuit

No. 10,597

(On Appeal from Order of District Court, Southern District, Northern Division, No. 5465, In Bankruptcy, entitled "In the Matter of Miron Rustigian and Hagoohi Rustigian, Husband and Wife, Debtors and Bankrupts".)

MIRON RUSTIGIAN and HAGOOHI RUSTIGIAN, Debtors and Bankrupts, and FRED J. ROGERS,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST &
SAVINGS ASSOCIATION,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL, AND DESIGNATION OF PARTS OF RECORD TO BE INCLUDED IN RECORD ON APPEAL

Now Come Miron Rustigian and Hagoohi Rustigian, Debtors and Bankrupts and two of the appellants herein, and Fred J. Rogers, attorney for the debtors and bankrupts and an appellant herein, and state that their appeal is from that portion of the Order made by Honorable Leon R. Yankwich, United States District Judge, on July 23rd, 1943,

and filed and entered in the office of the Clerk of said Court on the 23rd day of July, 1943, wherein said Order reverses the Order made by Herbert S. McDowell, Conciliation Commissioner and Referee, dated November 25th, 1942, and directs the said appellant Fred J. Rogers, within ten days from the date of said Order to repay to the Estate the sum of \$1500.00; and that appellants will rely on their appeal herein on the following points:

I.

That the United States District Court, Southern District, Northern Division, erred in finding that the Appellee, Bank of America National Trust & Savings Association, was a real party in interest in this bankruptcy proceeding and was an aggrieved party and had the right to petition for the review of the order made by the Conciliation Commissioner and Referee on the 25th day of November, 1942, awarding the sum of \$1500.00 as counsel fees to the appellant Fred J. Rogers.

II.

That the said United States District Court erred in disturbing the exercise by the Conciliation Commissioner and Referee of the discretion invested in him by the provisions of section 75 (b) of the Bankruptcy Act permitting the said Referee, in the interests of justice, to waive compliance by the appellants with the provisions of the Supreme Court General Orders in Bankruptcy, and particularly General Order 44 thereof.

III.

That the said United States District Court erred in refusing to exercise the discretion vested in said Court by the provisions of section 75 (b) of the Bankruptcy Act, in the interests of justice, to waive compliance by the appellants with the provisions of General Order 44 of the Supreme Court General Orders in Bankruptcy.

IV.

That the said United States District Court erred in finding that General Order 44 of the General Orders in Bankruptcy applied to the within proceeding and that the appellants were required to comply with the provisions of said General Order 44 as a condition precedent to the payment of attorney's fees for services rendered in said proceeding and in the protection of the property of the bankrupts over which the said Bankruptcy court had exclusive jurisdiction.

V.

That the said United States District Court erred in finding that the appellants were required to comply with General Order 44 of the Orders in Bankruptcy as a condition precedent to the payment of counsel fees to the appellant Fred J. Rogers for services rendered by the said Fred J. Rogers and other attorneys retained by him in protecting the property of the debtors and bankrupts.

VI.

That the said United States District Court erred in refusing to remand this matter to the Conciliation Commissioner and Referee for further proceedings in order to permit the said Conciliation Commissioner and Referee to make Findings of Fact and Conclusions of Law to support his Order dated November 25th, 1942, awarding the said appellant Fred J. Rogers the sum of \$1500.00 as counsel fees.

VII.

Appellants hereby designate to be included in and to constitute the record on appeal in said cause all the pleadings, petitions, papers, orders and documents referred to in that certain "Designation of the Portions of the Record, Proceedings and Evidence to be Contained in the Record on Appeal", bearing date the 15th day of September, 1943, heretofore filed by appellants in the District Court of the United States, Southern District of California, Northern Division, in the proceedings entitled "In the Matter of Miron Rustigian and Hagoohi Rustigian, Bankrupts, No. 5465, In Bankruptcy".

Dated: November 1st, 1943.

MATT GOLDSTEIN

406 Brix Building

Fresno 1, California

Attorney for Appellants

AFFIDAVIT OF SERVICE BY MAIL

[C. C. P. 1013A]

(Must be attached to original or a true
copy of paper served.)

No. 10597

State of California

County of Fresno—ss.

Ruhamah McKinsey, being sworn, says that she is a citizen of the United States, over 18 years of age, a resident of Fresno County, and not a party to the within action.

That affiant's (business) address is 406 Brix Building, Fresno, California

That affiant served a copy of the attached Statement of Points on which Appellants Intend to Rely on Appeal, and Designation of Parts of Record to be Included in Record on Appeal by placing said copy in an envelope addressed to Edmund Nelson and Daniel I. Schnabel, Esqs. at his office address 650 South Spring Street Los Angeles 14, California which envelope was then sealed and postage fully prepaid thereon, and thereafter was on November 5th, 1943, deposited in the United States mail at Fresno, California

That there is delivery service by United States mail at the place so addressed, or regular communication by United States mail between the place of mailing and the place so addressed.

RUHAMAH McKINSEY

Subscribed and sworn to before me on November 5th, 1943.

[Seal]

CHARLOTTE VIETTY

Notary Public in and for said county and state.

[Endorsed]: Filed Nov. 8, 1943. Paul P. O'Brien, Clerk.

No. 10,597

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

FRED J. ROGERS, MIRON RUSTIGIAN and
HAGOOHI RUSTIGIAN,

Appellants,

VS.

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION (a corpo-
ration),

Appellee.

APPELLANTS' OPENING BRIEF.

MATT GOLDSTEIN,

Brix Building, Fresno 1, California,

Attorney for Appellants.

FILED

DEC 28 1943

PAUL P. O'BRIEN,
CLERK

Subject Index

	Page
Preliminary Statement	1
Statement as to Jurisdiction and of the Case.....	3
Pertinent Statutory Provisions	8
Questions Presented by the Appeal.....	11
Statements of Points and Specifications of Errors Relied Upon	11
Argument	12
Categorical A	12
1. Bank of America N. T. & S. A. was not an aggrieved party within the meaning of Section 39(c) of the Bankruptcy Act	12
2. The authorities relied upon by the District Court do not support the bank's position.....	17
B. The District Court erred in disturbing the waiver by the conciliation commissioner of compliance with Order 44 of the General Orders in Bankruptcy.....	18
C. The District Court in the interests of justice should have waived compliance of Order 44 of the General Orders in Bankruptcy	21
D. The farmer bankrupts were proper parties to petition for attorneys' fees	21
Conclusion	22

Table of Authorities Cited

Cases	Pages
Federal Land Bank of Louisville v. Castanien, 116 Fed. (2d) 589	19
Gibbons v. Goldsmith, 222 Fed. 826.....	17, 18
Hewitt v. Berlin Machinery Works, 194 U. S. 296.....	17
In re Brown, 87 Fed. (2d) 309.....	16
In re Clark, 35 Fed. Supp. 722.....	15
In re Patterson McDonald Shipbuilding Company, 288 Fed. 546	15
In re Rose, 86 Fed. (2d) 69.....	16
In re Snyder, 4 Fed. (2d) 627.....	13
In re Weidenfeld, 254 Fed. 677.....	16
James v. Reconstruction Finance Corporation, 122 Fed. (2d) 807	14

Codes and Statutes

Bankruptcy Act:

Sec. 1, sub. 9 (11 U. S. C. Ch. 1).....	8, 18
Sec. 24 (11 U. S. C. A., Sec. 47).....	7, 17
Sec. 39 (c) (11 U. S. C. Ch. 68).....	10, 11
Sec. 75	3, 19, 21, 22
Sec. 75 (b) (11 U. S. C. Ch. 203).....	9, 11, 12, 20, 21
Sec. 75 (n) (11 U. S. C. Ch. 203).....	9
Sec. 75 (o) (11 U. S. C. Ch. 203).....	10
Sec. 75, sub. (p) (11 U. S. C. Ch. 203).....	10
Sec. 75 (S)	2, 18, 22
Sec. 75 (s), sub. 1 (11 U. S. C. Ch. 203).....	9, 21, 22
Sec. 75 (s), sub. 2.....	21
Sec. 75 (s), sub. 4 (11 U. S. C. Ch. 203).....	8, 18

General Orders in Bankruptcy:

Order 44	8, 11, 12, 18, 20, 21
Order 50	18
Order 50, sub. 1.....	19
Order 50, sub. 11.....	8

Judicial Code, Section 128 (28 U. S. C. A., Section 225)...	7
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No. 10,597

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRED J. ROGERS, MIRON RUSTIGIAN and
HAGOOHI RUSTIGIAN,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST
AND SAVINGS ASSOCIATION (a corpo-
ration),

Appellee.

APPELLANTS' OPENING BRIEF.

PRELIMINARY STATEMENT.

This is an appeal from an order of the District Court of the United States upon review of an order of a Conciliation Commissioner acting as a referee in bankruptcy of said court reversing an order of said Conciliation Commissioner which awarded to Fred J. Rogers, one of the appellants, the sum of \$1500.00 on account of counsel fees for legal services rendered to the appellants, Miron Rustigian and Hagoochi Rustigian, the bankrupts (sometimes designated in the rec-

(NOTE): All italics in this brief are the writer's unless otherwise indicated.

ord as the debtors). After the order of adjudication was made, one E. B. Campbell (as agent and on behalf of Bank of America N. T. and S. A.) had instituted an action in the Superior Court, Madera County, California against the bankrupts to quiet the bankrupts' title to and to divest the bankrupts of all their right in and ownership of the real property on which they had predicated their status as farmer bankrupts and of which they remained in possession under Sec. 75 (s) of the Bankruptcy Act. Fred J. Rogers, attorney for the bankrupts in possession, associated himself with two attorneys, Frank Curran and David E. Peckinpah, in defense of the action. The trial resulted in a verdict for the defendants, farmer bankrupts, although thereafter the trial court granted a new trial. After the trial was concluded, and on June 29, 1942, the bankrupts petitioned the Conciliation Commissioner (acting as referee in bankruptcy) for an order authorizing payment of the sum of \$1500.00 to Fred J. Rogers and his associated attorneys on account of counsel fees. Objections to the payment of said fees were filed by Security First National Bank of Los Angeles, a secured creditor, and Bank of America N. T. & S. A. The Conciliation Commissioner made an order on November 25, 1942, authorizing payment to Fred J. Rogers, alone, of the sum of \$1500.00 as attorneys' fees for the services rendered by all three of the attorneys, and that sum was paid to him.

Thereafter Bank of America N. T. & S. A. filed a petition to review said order, and on July 23, 1943

the United States District Court reversed said order of the Conciliation Commissioner and directed the appellant, Fred J. Rogers, to repay to the estate the sum of \$1500.00, which had previously been paid to him pursuant to said order. From the judgment of reversal of the United States District Court, this appeal is taken by the bankrupts and Fred J. Rogers.

STATEMENT AS TO JURISDICTION AND OF THE CASE.

The facts of the case are not particularly involved. (References are made hereinafter to the printed transcript.)

On or about the 18th day of May, 1940, Miron Rustigian and Hagoohi Rustigian filed a petition under section 75 of the Bankruptcy Act alleging that they were personally engaged primarily in farming operations and asking for leave to effect a composition or extension of time to pay their debts under said section (Tr., pp. 2-4). On May 18th, 1940, the petition of the debtors was approved and the matter was referred to John D. Boyle, Esq., one of the Conciliation Commissioners of the court (Tr., pp. 4-5). On August 20th, 1940, the said debtors filed an amended petition under section 75s of the Bankruptcy Act to be adjudicated bankrupts in accordance with the provisions thereof and to be allowed to retain possession of their property under the supervision and control of the court (Tr., pp. 6-8). Thereafter and on August 23rd, 1940, an order of adjudication, reference and

temporary restraining order under section 75s of the Bankruptcy Act was entered, referring the matter to the Conciliation Commissioner for Madera County, California, to act as referee in bankruptcy of said court (Tr., pp. 8-9). The said John D. Boyle resigned as Conciliation Commissioner and on January 26th 1942, the matter was referred to Herbert McDowell as Conciliation Commissioner (Tr., p. 10).

On June 29th, 1942, a petition was filed by the debtors for an order authorizing the payment of \$1500.00 on account of counsel fees to three attorneys, Fred J. Rogers, attorney for the debtors, Frank Curran and David Peckinpah (Tr., pp. 14-18). The petition stated that on November 27th, 1941, E. B. Campbell had filed an action against the bankrupts (and one Harry Rustigian) to quiet title to the property upon which the bankrupts predicated their status as farmers. The petition set forth that the services of the three attorneys above named were rendered in resisting the action (which was really brought on behalf of Bank of America N. T. & S. A.) (Tr., p. 15) and further stated that at the trial "the jury brought in and rendered a verdict in favor of these debtors" (Tr., pp. 15-16). Objections to said petition were thereafter filed by Security First National Bank of Los Angeles, a secured creditor (Tr., pp. 18-25) and by Bank of America N. T. & S. A. Said Bank of America made no claim that it was a creditor, lienor of a creditor or that it had any interest in this proceeding except as a claimant to the real property upon which the bankrupts predicated their status as

farmers "since May 24, 1940" (Tr., p. 26) and that "the title to said real property is at this time the subject of pending litigation" (Tr., p. 26).

Upon the issues raised by the petition and the objections filed, the matter came on for hearing before the Conciliation Commissioner acting as a referee on August 14th, 1942 (Tr., p. 12; p. 30). Evidence was taken in support of the petition (Tr., pp. 38-80), the witnesses being cross-examined by the attorneys representing Security First National Bank of Los Angeles and Bank of America N. T. & S. A.

The testimony was to the effect that Frank Curran began his preparation about a month before the trial, and that for almost two weeks before the trial he devoted himself exclusively to preparation (Tr., pp. 39 and 40). He also spent three days on the jury trial of the case (Tr., p. 40). Thereafter, findings of fact and conclusions of law were prepared (Tr., p. 41). David E. Peckinpah spent approximately 35 to 40 hours before trial in preparation (Tr., pp. 62 and 63), and three days on the trial (Tr., pp. 49 to 63). Fred J. Rogers spent approximately ten days preparing for trial (Tr., p. 79). He also participated in the trial of the case (Tr., p. 58).

The testimony further showed that the services of counsel were of great benefit to the estate. By obtaining a favorable verdict, the property of the estate has been preserved; the bankrupts have been enabled to pay for its maintenance and upkeep, and monies have been realized and applied to the payments of the bankrupts' obligations (Tr., pp. 45 and 46).

The testimony further showed that the Conciliation Commissioner was at all times kept informed of the retention of counsel and was conferred with by the appellant, Fred J. Rogers, prior to the retention of Frank Curran and David E. Peckinpah (Tr., pp. 70 to 74). The Conciliation Commissioner stated upon the hearing that he advised Mr. Rogers (Tr., p. 72),

“that there would be only one attorney’s fee paid, and this court wouldn’t make any arrangements as to its amount, character or anything of that character, only that it would allow what was shown on a petition as to knowledge exercised and responsibility assumed and work done.”

Further:

“The Conciliator. Well, Mr. Rogers did tell me who he was going to employ. As to the amount to be paid, there was no discussion. We didn’t consider such discussion, but as to the gentlemen who were going to be employed, I assured him that the check would have to be drawn in one—I didn’t intend to break up any check” (Tr., p. 73).

He further stated:

“The Conciliator. But I did tell him that also he was justified in going ahead and getting them to help him” (Tr., p. 73).

It was admitted by the appellant, Fred J. Rogers, that no written petition was presented to the Commissioner and that no formal order was made by this Commissioner authorizing the retention of counsel to defend the action (Tr., pp. 69 and 70).

Following said hearing, the Conciliation Commissioner on November 25, 1942 made his order granting the petition to the extent of allowing to appellant, Fred J. Rogers, the sum of \$1500.00 on account of attorneys' fees for entire services so rendered by the three attorneys (Tr., pp. 30, 31).

The certificate of review of the Commissioner shows that "through inadvertence" the Conciliator failed to make findings of fact and conclusions of law and requested that the matter be referred back to him "for the purpose of making findings of fact and conclusions of law (Tr., p. 12). Only Bank of America N. T. and S. A. petitioned to review said order (Tr., pp. 32 to 38). Upon review the District Court reversed the order of the Referee and directed appellant Fred J. Rogers to repay to the estate the sum of \$1500.00 (Tr., pp. 88 and 89). The District Court also rendered an opinion in connection with the making of said order (Tr., pp. 83 to 88).

The jurisdiction of this court to review the order and judgment of the District Court is based upon Section 24 of the Bankruptcy Act 11 U. S. C. A., Section 47, as revised and amended by the Chandler Act of June 22, 1938; Judicial Code, Section 128 (28 U. S. C. A., Section 225). Notice of appeal duly filed (Tr., pp. 89, 90). Designation of portions of record, proceedings and evidence contained in the record on appeal (Tr., pp. 97 to 99).

PERTINENT STATUTORY PROVISIONS.

1. Sec. 1, sub. 9 of the Bankruptcy Act, Title 11 U. S. C. Ch. 1 provides:

“ ‘Court’ shall mean the judge or *the referee of the court of bankruptcy* in which the proceedings are pending;”

2. Sec. 75 (s), sub. 4 of the Act, Title 11 U. S. C. Ch. 203 provides in part:

“The *Conciliation Commissioner*, appointed under subsection (a) of Sec. 75 of this Act, as amended, *shall* continue to *act*, and act *as referee*, when the *farmer debtor* amends his petition or answer, asking to be adjudged a bankrupt under the provisions of subsection (s) of Sec. 75 of this Act, and continue so to act until the case has been finally disposed of.”

3. Order 50, sub. 11, of the General Orders in Bankruptcy of the Supreme Court of the United States provides in part:

“In so far as is consistent with the provisions of Sec. 75 and of this General Order, the conciliation commissioner shall have all the powers and duties of a referee in bankruptcy and the general orders in bankruptcy shall apply to proceedings under said section. * * *”

4. Order 44 of the General Orders in Bankruptcy of the Supreme Court provides in part:

“No attorney for a receiver, trustee or *debtor in possession* shall be appointed except upon the order of the court, which shall be granted only upon the verified petition of the receiver, trustee or debtor in possession, stating the name of the

counsel whom he wishes to employ, the reasons for his selection, the professional services he is to render, the necessity for employing counsel at all, and to the best of the petitioner's knowledge all of the attorney's connections with the bankrupt or debtor, the creditors or any other party in interest, and their respective attorneys. * * *"

5. Sec. 75 (b) of the Bankruptcy Act, Title 11 U. S. C. Ch. 203 provides in part as follows:

"The Supreme Court is authorized to make such general orders as it may find necessary properly to govern the administration of the office of conciliation commissioner and proceedings under this section; but *any district court* of the United States *may, for good cause and in the interests of justice, permit any such general order to be waived.*"

6. Sec. 75 (s), sub. 1, of the Bankruptcy Act, Title 11 U. S. C. Ch. 203, provides in part:

"After the value of the debtor's property shall have been fixed by the appraisal herein provided, the referee shall issue an order setting aside to such debtor his unencumbered exemptions, and his unencumbered interest or equity in his exemptions, as prescribed by the State law, and shall further order that the possession, under the supervision and control of the court, of any part or parcel or all of the remainder of the debtor's property shall remain in the debtor, as herein provided for, subject to all existing mortgages, liens, pledges, or encumbrances. * * *"

7. Sec. 75 (n) of the Bankruptcy Act, Title 11 U. S. C. Ch. 203, provides in part as follows:

“The filing of a petition or answer with the clerk of court, or leaving it with the conciliation commissioner for the purpose of forwarding same to the clerk of court, praying for relief under Sec. 75 of this Act, as amended, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property, * * *.”

8. Sec. 75 (o) of the Bankruptcy Act, Title 11 U. S. C. Ch. 203, prohibits creditors of the bankrupt, or other persons, from collecting any demands or debts, or from filing of foreclosure of any liens, mortgages, or encumbrances against said land. The prohibitions of this section are further amplified by Sec. 75, subd. (p) of the Bankruptcy Act, Title 11 U. S. C. Ch. 203, which reads as follows:

“The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor’s property, wherever located. *All such property shall be under the sole jurisdiction and control of the court in bankruptcy*, and subject to the payment of the debtor farmer’s creditors, as provided for in Sec. 75 of this Act.”

9. Sec. 39 (c) of the Bankruptcy Act, Title 11 U. S. C. Ch. 68, provides in part as follows:

“A *person aggrieved by an order of a referee* may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition

for *review* of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing.”

QUESTIONS PRESENTED BY THE APPEAL.

1. Was the Bank of America an aggrieved party within the meaning of Sec. 39 (c) of the Bankruptcy Act, and, as such, entitled to review the order of the Conciliation Commissioner awarding attorneys' fees?

2. Was the District Court justified in disturbing the exercise by the Conciliation Commissioner (acting as a referee) under Sec. 75 (b) of the Bankruptcy Act of his power to waive compliance with the General Orders in Bankruptcy upon good cause shown and in the interests of justice?

3. Under all the facts and circumstances shown in the record, did the District Court err in not waiving compliance with Order 44 of the General Orders in Bankruptcy?

STATEMENTS OF POINTS AND SPECIFICATIONS OF ERRORS RELIED UPON.

1. That the District Court erred in reversing the order of the Conciliation Commissioner awarding counsel fees.

2. That the District Court erred in entertaining the petition of the Bank of America to review the order of the Conciliation Commissioner.

3. That the District Court erred in refusing to dismiss the petition filed by the Bank of America to review the order of the Conciliation Commissioner awarding counsel fees.

4. That the District Court erred in reversing on review the exercise by the Conciliation Commissioner of the discretion vested in him by Sec. 75 (b) of the Bankruptcy Act, permitting him to waive compliance with the General Orders in Bankruptcy upon good cause shown and in the interests of justice.

5. That the District Court erred in failing to waive compliance with Order 44 of the General Orders in Bankruptcy upon good cause shown and in the interests of justice.

ARGUMENT.

CATEGORICAL A.

1. **Bank of America N. T. & S. A.** was not an aggrieved party within the meaning of Section 39 (c) of the Bankruptcy Act.

In the objections which were filed by the Bank of America (Tr., pp. 26 to 30) and in its petition for review (Tr., pp. 32 to 38) there is *not a single statement of fact* showing the merits of its alleged claim of title to the farmer bankrupt's property. Both contain only the bare and wholly unsupported statement that title is *claimed* by the bank (Tr., p. 26) and that the bank's claim of title is "the subject of pending litigation" (Tr., p. 26). The bank offered *no testimony whatsoever* upon the hearing before the Con-

ciliation Commissioner *to support its alleged claim of title.*

The Bank of America finds itself in the anomalous and inconsistent position of being both a friend and a foe to the bankruptcy proceedings. On the one hand, it seeks by hostile and adverse litigation to annihilate and destroy the estate in bankruptcy by stripping it of its principal asset, and on the other, it has entered the bankruptcy proceedings for the purpose of resisting payment of fees to the attorneys who have, thus far, successfully resisted the bank's attempt to destroy the estate in bankruptcy.

The real question, therefore, is whether one who is neither creditor, lienor, nor assignee of a creditor, nor has filed any claim in the bankruptcy proceedings itself, but who has made an adverse, hostile, and wholly unsupported claim to the assets of the bankrupt's estate, has the standing of an aggrieved party, so as to be entitled to review orders made by the Conciliation Commissioner (whether erroneous or correct) in the ordinary course of administration. As is pointed out elsewhere, no creditor or party who has filed a claim in the conciliation proceedings asked for the review of the 'referee's order.

We have been able to find no authority sustaining the bank's right of review, and there is much authority supporting a contrary view.

In *In re Snyder*, 4 Fed. (2d) 627, an order had been made by the District Court reopening the bankrupt's estate in order that the trustee might sue a

third party in whose name it was alleged real property stood, which belonged to the bankrupt. The third party, against whom the suit was authorized, sought to vacate the order. Its motion was denied, and it subsequently appealed. This court dismissed the appeal, stating in its opinion:

“The appellant’s interest, to suffice, must be a *direct* and *immediate* pecuniary interest in the particular cause, and it is not sufficient that he is interested in the question litigated, *or that, by the determination of the question litigated, he may be a party to some other suit*, growing out of the decision of that question. * * * If the petitioner has a legal right to review an order of this kind, we see no reason why every person, against whom a suit is authorized by a referee in bankruptcy, may not review the order authorizing the suit, even up to the Circuit Court of Appeals.” (p. 628.)

In *James v. Reconstruction Finance Corporation*, 122 Fed. (2d) 807, appellant had applied for an order directing the trustees of an insolvent railroad corporation to make payment on its certificates. Its application was denied, and it appealed. This court dismissed the appeal upon the ground that the appellant was not an aggrieved party, the court stating:

“Appellant did not own or hold any of the certificates mentioned in the order. All were owned and held by Reconstruction Finance Corporation. * * * Thus the party—and we think the only party—adversely affected by the order was Reconstruction Finance Corporation, and it has not

appealed. Whether or not it might have been appealed need not be decided. * * *

It is immaterial, if true, that appellant before filing its motion had sought and obtained permission to intervene, and thus had become a party to the proceeding; for even a party may not appeal from a judgment or order unless he has *some interest in the subject matter thereof.*" (p. 808.)

In *In re Clark*, 35 Fed. Supp. 722, a creditor of the bankrupt whose claim had been disallowed because it was filed after the expiration of the time to file claims, sought the review of an order of a referee authorizing the trustee to compromise a claim against the estate. The creditor had previously filed objections to the approval of the compromise. Its attempt to review the order was dismissed, the court stating:

"This order of the referee merely affects the distribution of the estate of the bankrupt in the hands of the trustee and the amount to be received by each creditor who is entitled to participate therein. * * * There can be no prejudicial error without injury, and as the Company is not permitted to participate in the present anticipated distribution of the bankrupt's estate, it is not in a position to complain of any order relating to the manner and extent of payments *to creditors who have filed Proofs of Claim, none of whom attack the order of the referee.*" (pp. 723-724.)

In *In re Patterson McDonald Shipbuilding Company*, 288 Fed. 546, an attempt made by a creditor whose claim was disallowed to appeal from an order allowing a salary to an officer of a bankrupt corpora-

tion for services rendered by him to the trustee in bankruptcy was dismissed, because the appellant did not have "the status of a creditor".

In *In re Rose*, 86 Fed. (2d) 69, a bankrupt farmer had attempted to appeal from an order denying the petition of the Conciliation Commissioner for a stay of a state court action brought against the farmer bankrupt. The court dismissed the appeal, holding that even though the bankrupt's property was affected by the order, she was nevertheless not an aggrieved party, stating in part:

"Amicus Curiae apparently contend that, because appellant filed the petition, she was a party to all collateral proceedings which might arise in the main proceeding. If that is the contention, it is untenable, because *many issues arise in the administration of a bankrupt's estate, in which the bankrupt cannot even remotely be interested, for example, controversies between the trustee and the creditors.*" (p. 71.)

In *In re Weidenfeld*, 254 Fed. 677, the court held that the bankrupt could not appeal from an order directing an examination of his wife, because he was not "the party aggrieved within the meaning of section 24 (b)" of the Bankruptcy Act.

In *In re Brown*, 87 Fed. (2d) 309, the court held that the bankrupt has no standing to appeal from an order denying creditors leave to intervene in the proceedings.

The bank could, under no theory, participate in any dividends or distribution of the assets of the bank-

rupt by the bankruptcy court. Yet, the award of counsel fees could, in the final analysis, affect only the dividends and distribution to creditors. To permit one who is a stranger (and a hostile one at that), and who cannot share in the distribution of the bankrupt's property, to disturb and review orders made in the ordinary course of administration can lead only to chaos and confusion in estate administration.

2. The authorities relied upon by the District Court do not support the bank's position.

The District Court relied upon Section 24 of the Bankruptcy Act and *Hewitt v. Berlin Machinery Works*, 194 U. S. 296, and *Gibbons v. Goldsmith*, 222 Fed. 826, in support of its holding that the Bank of America was an aggrieved party entitled to review the Conciliation Commissioner's order. We respectfully submit that none of them are in point.

Neither Section 24 (which deals with appellant's jurisdiction) nor the cases cited have any reference to the right of a stranger to the proceeding to review *administrative orders*.

In the *Hewitt* case, *supra*, the question was whether an appeal could be taken by the trustee from an order made by the bankruptcy court directing that the trustee should surrender certain of the assets of the bankrupt to a conditional vendor. The court held that the contest between the conditional vendor and the trustee was a "controversy in bankruptcy", and the trustee had a right to appeal from the order. Not even remotely, did the court there consider the question as to whether the third party could have appealed

from a purely administrative order, having no relation to the particular "controversy in bankruptcy" with the trustee.

Similarly in the *Gibbons* case, *supra*, the question was whether a proceeding brought by the trustee against the bankrupt's wife to determine title to property in which she claimed a community interest was a "controversy in bankruptcy". The court held that it was, and that the bankruptcy court had jurisdiction to determine the wife's claim. The court was there not called upon to consider and did not consider the rights of third party claimants to review administrative orders made by a referee in bankruptcy.

B. THE DISTRICT COURT ERRED IN DISTURBING THE WAIVER BY THE CONCILIATION COMMISSIONER OF COMPLIANCE WITH ORDER 44 OF THE GENERAL ORDERS IN BANKRUPTCY.

While the order of the Commissioner makes no specific statement that he waived compliance with General Order 44 of the Bankruptcy Act (no findings of fact or conclusions of law having been made) such waiver is implicit in his order.

The word "court" as used in the Bankruptcy Act also includes a "referee in bankruptcy" (Sec. 1, subd. 9, Bankruptcy Act). In proceedings under Sec. 75 (s) of the Act, the Conciliation Commissioner has all the rights and powers of a referee in bankruptcy (Sec. 75 (s), subd. 4, Bankruptcy Act, Order 50, General Orders in Bankruptcy).

In *Federal Land Bank of Louisville v. Castanien*, 116 Fed. (2d) 589, the court stated with reference to powers of Conciliation Commissioner as follows:

“It would seem to be clear, from consideration of the foregoing sections, that except where otherwise specifically provided, a Conciliation Commissioner is clothed by the Act with all the jurisdiction and powers of a referee, and *that whatever the court may do*, the Commissioner may do, unless the power to be exercised is conferred not upon the court as such, but upon the judge. There is nothing novel in this concept. Within the meaning of old sections 23, sub. b and 60, sub b, 11 U.S.C.A. sections 46, sub b, 96, sub. b, ‘Courts’ are taken to include the referee, *MacDonald v. Plymouth Trust Co.*, 286 U.S. 263, 268, 52 S. Ct. 505, 76 L. Ed. 1093; *In re Pottasch Bros. Co.*, 2 Cir., 79 F. 2d 613, 101 A.L.R. 1182. A Conciliation Commissioner is clearly a referee. While he is a particular kind of referee, and while to him are referred the supervision and liquidation of the estates of farmer-debtors only, it would seem that within such limits he exercises all of the jurisdiction and authority with which general referees are clothed. * * *”

The General Orders in Bankruptcy apply to provisions under Sec. 75 of the Bankruptcy Act, Order 50, sub. 1, General Orders in Bankruptcy.

Congress has made a special exception of proceedings under Sec. 75 of the Act, insofar as the General Orders in Bankruptcy are concerned. It specifically permits waiver by the District Court of the Orders in Bankruptcy “for good cause shown and in

the interests of justice'' Sec. 75 (b) of the Bankruptcy Act.

This is a frank recognition of the highly informal manner in which farmers' property is administered under the Act, and that courts in administering the Act should look to the substance rather than to the form.

No claim is here made, and nothing in the record suggests that the payment of attorneys' fees in this matter would violate the spirit of the Bankruptcy Act, or any of its General Orders. The Conciliation Commissioner at all times knew and, in fact, authorized the retention of counsel to defend the action brought by the bank (Tr., pp. 72-73). True it is that the authority given by him to retain counsel was oral, informal and embodied in no written orders. Yet it is equally true that in reliance thereof the attorneys rendered valuable services to the estate, have protected the estate from destruction by the bank and have enabled the farmer bankrupt to keep his farm, maintain his property and pay his debts.

The District Court reversed the Commissioner's order and denied payment of attorneys' fees primarily because of the failure to obtain a formal order of retention, as required in Order 44 of the General Orders in Bankruptcy (Tr., p. 87). We believe that the salutary provisions of Sec. 75 (b) of the Bankruptcy Act render it proper for the Commissioner, acting as referee of the bankruptcy court, to waive compliance with that order, and that his discretion should not have been disturbed by the District Court.

The ends of justice would be far better served by paying reasonable fees to attorneys in a *situation such as this, than be denying such payment.*

C. THE DISTRICT COURT IN THE INTERESTS OF JUSTICE SHOULD HAVE WAIVED COMPLIANCE OF ORDER 44 OF THE GENERAL ORDERS IN BANKRUPTCY.

Those things which we have said earlier in this brief with reference to the exercise by the referee (as an arm of the bankruptcy court) of his discretion to waive compliance with Order 44 apply with equal force to the order of the District Court. Nowhere in its opinion did the court suggest any equitable reasons why attorneys' fees should not have been allowed and paid. We can conceive of no case in which the equities in favor of payment of attorneys' fees could have been stronger. No creditor complains of the order. If the benign provisions of Sec. 75 (b) of the Bankruptcy Act were not intended to cover such a case as this, then what is its purpose?

D. THE FARMER BANKRUPTS WERE PROPER PARTIES TO PETITION FOR ATTORNEYS' FEES.

Under Sec. 75 of the Bankruptcy Act and its various subdivisions, the farmer debtor or the farmer bankrupt (as the case may be) is, in effect, his own trustee. He alone retains possession of his property under the supervision and control of the Conciliation Commissioner. Sec. 75 (s) subds. 1 and 2 of the

Bankruptcy Act. Nowhere in Sec. 75 (s) is provision made for the election of a trustee in bankruptcy, as in other bankruptcy cases. The defense of any suit brought against the bankrupts or their estates must, of necessity, be made by the farmer bankrupts under the supervision and control of the Conciliation Commissioner. Since the farmer bankrupt is required by the Act to surrender all his assets (except exempt property) (Sec. 75 (s), sub. 1, Bankruptcy Act) and to place them under the control of the Conciliation Commissioner, the estate in bankruptcy is the only available source from which attorneys' fees can be paid for defending the farmer bankrupt's title against attack from third parties.

In ordinary bankruptcy proceedings an action such as was instituted by the bank would be defended by a trustee in bankruptcy. In proceedings under Sec. 75, his role is filled by the farmer bankrupt under the supervision of the Conciliation Commissioner.

CONCLUSION.

The order of reversal of the District Court does not take into consideration the announced purpose of Congress to permit farmer debtors and farmer bankrupts proceedings to be administered with informality and with a view to serving the ends of justice rather than strict adherence to the rules of procedure.

In any event, there is not the slightest legal or equitable basis upon which the Bank of America may

review this particular administrative order of the Conciliation Commissioner. To say that it may do so, is to permit similar interference at every stage of the proceedings with administrative orders for the payment of debts, mortgages and the claims of creditors of the farmer bankrupts. This would open the door to every adverse party who has made a claim to the assets of the bankrupt to interfere with the orderly administration of the bankrupt's affairs. Such a precedent must inevitably lead to chaos and confusion in bankruptcy matters.

This court should reinstate the order of the Conciliation Commissioner upon the grounds set forth in this brief and should reverse the order of the District Court.

Dated, Fresno, California,
December 27, 1943.

Respectfully submitted,
MATT GOLDSTEIN,
Attorney for Appellants.

No. 10,597.

IN THE

10

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED J. ROGERS, MIRON RUSTIGIAN and
HAGOOHI RUSTIGIAN,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION (a corporation),

Appellee.

APPELLEE'S BRIEF.

FILED

JAN 27 1944

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TOPICAL INDEX.

PAGE

Argument, points and authorities.....	1
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I.

Bank of America National Trust and Savings Association was an aggrieved party and entitled to review the order of the Conciliation Commissioner awarding attorneys' fees, and in any event was recognized as a party upon the hearing before the Conciliation Commissioner, and was therefore entitled to review said order.....	1
---	---

II:

In the absence of full compliance with Order 44 of the Gen- eral Orders of Bankruptcy, the Commissioner was without authority to award attorneys' fees.....	7
---	---

III.

Failure of the Conciliation Commissioner to make findings of fact and conclusions of law in support of his order makes it invalid	13
Conclusion	14

TABLE OF AUTHORITIES CITED.

CASES.

PAGE

Albers v. Dickinson, 127 Fed. (2d) 957.....	9
Clark, In re, 35 Fed. Supp. 722.....	3
Cockcroft, In re, 104 U. S. 578.....	4
Eureka Upholstering Co., In re, 48 Fed. (2d) 95.....	8
Forscher v. Graham, 32 Fed. (2d) 654.....	5
Grant v. United States, 227 U. S. 74.....	4
H. L. Stratton, Inc., In re, 51 Fed. (2d) 984.....	7, 12
Hinckley v. Gilman C. S. R. Company, 94 U. S. (4 Otto) 467	4
James v. Reconstruction Finance Corporation, 122 Fed. (2d)	
807	3
Patterson McDonald Shipbuilding Company, In re, 288 Fed. 546	3
Peppers Fruit Company, In re, 24 Fed. Supp. 119.....	5
Perry v. Baumann, 122 Fed. (2d) 409.....	14
Progress Lektro Shave Corp., In re, 117 Fed. (2d) 602.....	12
Rose, In re, 86 Fed. (2d) 69.....	4, 5
Snyder, In re, 4 Fed. (2d) 627.....	2
United States Aluminum Company of America, 2 F. R. D. 224	13
United States ex rel. State of Louisiana v. Jack, 244 U. S. 397	4
Weil v. Neary, 278 U. S. 160.....	7

STATUTES.

Bankruptcy Act, Sec. 75.....	10
Bankruptcy Act, Sec. 75(b).....	9, 10, 11, 12
Bankruptcy Act, Sec. 157 (11 U. S. C. A., Sec. 557).....	12
Federal Rules of Civil Procedure, Rule 52(a) (28 U. S. C. A., Sec. 723(c))	13, 14
General Orders in Bankruptcy, General Order 37 (11 U. S. C. A., Sec. 53).....	13
General Orders of Bankruptcy, General Order 42.....	9
General Orders of Bankruptcy, General Order 44.....	7, 9, 10, 11
General Orders of Bankruptcy, General Order 50	10, 11

No. 10,597.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED J. ROGERS, MIRON RUSTIGIAN and
HAGOOHI RUSTIGIAN,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST AND
SAVINGS ASSOCIATION (a corporation),

Appellee.

APPELLEE'S BRIEF.

ARGUMENT, POINTS AND AUTHORITIES.

(Emphasis our own throughout unless otherwise indicated.)

I.

Bank of America National Trust and Savings Association Was an Aggrieved Party and Entitled to Review the Order of the Conciliation Commissioner Awarding Attorneys' Fees, and in Any Event Was Recognized as a Party Upon the Hearing Before the Conciliation Commissioner, and Was Therefore Entitled to Review Said Order.

The Bank, through its assignee E. B. Campbell, claims all right, title and interest in and to the Madera County prop-

erty, upon which the debtors predicate their status as farmers, and the rents, issues and profits thereof since May 24, 1940. [Tr. pp. 26-27.] This gave the Bank a status and position in the proceedings even more fundamental than that of a lien holding creditor, since, until the determination of the quiet title action, delegated to the State court for trial, had been made, no part of said real property nor of the rents, issues and profits thereof would constitute an asset of the bankruptcy estate.

It is conceded that the only source from which attorneys' fees could be paid is rents, issues and profits from said property, the *very assets in dispute*.

It is further conceded that the Bank offered no testimony upon the hearing before the Conciliation Commissioner, to support its alleged claim of title. Obviously it was not required to do so since that was not the issue before the Commissioner. That the Bank did claim title was well known to all parties, as was the fact that litigation was still pending to determine that issue. In fact the sole basis for the petition for allowance of counsel fees was the services rendered by the attorneys for the debtors in contesting the quiet title action brought on behalf of the Bank.

There appears to be an absence of authorities covering the identical factual situation here presented. The cases cited in appellants' brief are not in point, and are readily distinguishable.

In the case of *In re Snyder*, 4 Fed. (2d) 627, cited on page 13 of appellants' brief, the question involved was whether or not the appellant had the right to review an order authorizing suit against him. It did not involve any right, claim or interest in the bankruptcy estate. Ap-

pellant sought by his motion to vacate to obtain a determination in a summary proceeding of the precise issues to be decided in the plenary suit authorized to be brought against him. In the instant case the Bank had a direct and immediate pecuniary interest in the particular cause, namely, the disposition of assets to which it had made claim of title.

In *James v. Reconstruction Finance Corporation*, 122 Fed. (2d) 807, cited on page 14 of appellants' brief, the significant part of the opinion quoted by appellants is

“* * * for even a party may not appeal from a judgment or order unless he has some interest in the subject matter thereof” (p. 808).

What greater interest could the Bank have in the subject matter than to claim complete title thereto?

In *re Clark*, 35 Fed. Supp. 722, cited on page 15 of appellants' brief, the creditor whose claim was disallowed could no longer participate in the assets of the bankruptcy estate, and therefore whatever disposition was made of them could cause him no injury, but that is not true of the Bank's position. Distribution of the very assets to which the Bank made claim of title would certainly be an injury and prejudice to the Bank.

The case of *In re Patterson McDonald Shipbuilding Company*, 288 Fed. 546, cited on page 15 of appellants' brief, is to the same effect as the *Clark* case, *supra*, and the same argument applies to it.

The remaining cases cited by appellants involve the right of a bankrupt to appeal. It requires no argument to point out that the position of a bankrupt is different from that of a creditor or adverse claimant. The bankrupt surren-

order allowed the claim of one Robert J. Graham. The petition to review the allowance of the claim was filed by another creditor who had opposed the allowance before the Referee. The District Court held that it lacked jurisdiction to entertain such a petition because the petition to review was not filed by the trustee, as the representative of all creditors. In reversing the District Court the Court stated:

“These provisions (referring to Sections 2 and 38 of the Bankruptcy Act) make it clear that the Referee is not in any sense a separate court, nor endowed with any independent judicial authority, and is merely an officer of the Court of Bankruptcy, having no power except as conferred by the order of reference—reading this, of course, in the light of the act; and that his judicial functions, however important, are subject always to the review of the Bankruptcy Court. It is now universally conceded that a Bankruptcy Court is a court of equity, and the Referee but the officer or arm of such court. The right of review by the District Court extends to every final order of the Referee, and may be asserted by anyone having a direct substantial interest or by the court, *sua sponte*.”

While we have devoted considerable space on this point, we cannot help but feel, in the light of the above decisions, that the true question is not the right of the Bank to review the Commissioner's order, but whether or not the Commissioner's order was proper and valid.

II.

In the Absence of Full Compliance With Order 44 of the General Orders of Bankruptcy, the Commissioner Was Without Authority to Award Attorneys' Fees.

The case of *Weil v. Neary*, 278 U. S. 160, is authority for the rule that General Orders in Bankruptcy and the rules of the District Court have the force and effect of law.

There are numerous authorities that hold that General Order 44 must be strictly observed.

In *In re H. L. Stratton, Inc.*, 51 Fed. (2d) 984, application was made by the Receiver in Bankruptcy for the appointment of attorneys for the Receiver. The petition failed to set forth the relation of the attorneys sought to be appointed with one of the creditors of the bankrupt, although it appeared that oral statements of that relationship were made to the judge. Upon the application for allowance of attorneys' fees in the sum of \$15,000.00, it appeared that the attorneys rendered valuable services to the estate of the bankrupt. In reversing the decision of the District Judge who had confirmed the allowance of attorneys' fees on the ground that there had been substantial conformity to General Order 44, the court said at page 987:

“Though the attorneys manifestly acted in good faith, their procedure was in disregard of rules made to safeguard insolvent estates, and was of the slipshod sort which often has characterized bankruptcy

practice. We cannot too emphatically insist that the rules are to be strictly observed and that oral statements made to a judge are no lawful substitute for the affidavits which are prescribed."

And at page 988 the court continued:

"Although everything indicates that the attorneys rendered valuable services to the estate of the bankrupt, we are constrained to hold that they are barred from receiving compensation as attorneys for the Receivers because of failure to comply with General Orders 44 and 42 and local rules 4 and 11. * * * This is a drastic order but the rules were made to be followed and require the result we have reached."

In *In re Eureka Upholstering Co.*, 48 Fed. (2d) 95, the Receiver who was later appointed trustee, never applied to the court for the appointment of attorney. It appeared, however, that while acting as Receiver, he consulted with the attorneys for the petitioning creditors and actually retained them as his attorneys. The referee and judge allowed \$100.00 as attorneys' fees. The attorneys appealed. The court affirmed the allowance of \$100.00 as compensation for acting for the petitioning creditors and in denying any allowance as attorneys for the Receiver, the court stated:

"Apparently the appellants suppose that by acting upon the retainer of the Receiver as his attorneys, they acquired that status and may recover on that basis. This is not true. The forty-fourth General Order in Bankruptcy (11 U. S. C. A., Sec. 53) provides that no attorney shall be appointed for the Receiver except by order of court and upon petition of the Receiver supported by the proposed attorney's affidavit. * * * The order and the rule were passed

to control serious abuses and are to be strictly observed; without an order of court upon full presentation of the relation of the proposed attorney with all other interests involved, not only may he not be retained but he can recover nothing no matter how beneficial, or how arduous, his services."

Albers v. Dickinson, 127 Fed. (2d) 957, involved the attempt to surcharge the estate of the Trustee in Bankruptcy for attorney's fees paid without compliance with General Orders 42 and 44; the court held that the attorney's fees were improper and surcharged the account of the Trustee with the amounts paid to said attorney. In commenting on the rules, the opinion states at page 961:

"These rules contemplate and require that, in order to permit the payment of any attorney's fees out of a bankrupt estate, as part of its administrative expenses, there must be a verified petition on the part of the Trustee, an order of appointment, a petition for allowance of compensation by such appointed attorney, together with the prescribed affidavit negating the possibility of any improper fee division, as well as a notice to creditors. Without a full compliance with these requirements, the Trustee has no right to make any payment of attorney's fees out of the bankrupt estate; *the referee is without authority to approve any payments which the Trustee has then made*; and no attorney can legally receive or retain any such payments out of the estate for services which he may have rendered."

Appellants rely on Section 75(b) of the Bankruptcy Act as authority for the rule that the District Court may waive the Orders in Bankruptcy. A careful reading of the

language of said section clearly indicates that that was not the intention of Congress. Section 75(b) reads in part:

“* * * the Supreme Court is authorized to make such general orders as it may find necessary properly to *govern the administration of the office of Conciliation Commissioner*, and proceedings under this section; but any District Court of the United States may, *for good cause shown*, and in the interests of Justice, permit any *such* general order to be waived.”

It is obvious that the section refers only to the particular general orders passed in accordance with said section and applied specifically to the administration of the office of the Conciliation Commissioner and to proceedings under Section 75.

In accordance with Section 75(b) the Supreme Court as of April 24, 1933, established rule 50 as an addition to General Orders in Bankruptcy. This rule refers generally to administrative matters and in no way refers to the allowance of attorney's fees. At the time of the adoption of General Order 50, General Order 44 was already in effect and was applicable to all bankruptcy matters generally. Therefore, in enacting Section 75(b), Congress could not have intended to in any way affect, modify or disturb any of the general orders then in effect but must have intended the formulation of new rules or orders applying specifically to Section 75. The true effect of the words “permit any *such* general order to be waived,” is apparent. It necessarily relates back to the general orders which the Supreme Court was authorized to make under this section. Therefore, the authority to waive can only be exercised with respect to General Order 50. The waiver

of any provision contained in General Order 50, or of all its provisions, would in no way affect the allowance of attorney's fees and could in no way abrogate the provisions of General Order 44. We respectfully submit that the only order controlling the appointment of attorneys is General Order 44, and that therefore the strict construction of its mandatory provisions by the courts in the decisions above cited and in numerous other decisions should prevail.

In any event, conceding for the purpose of argument only, that Section 75(b) grants the right to waive the General Orders in Bankruptcy, we then come to the consideration of how can such General Orders be waived. The record fails to disclose a definite and specific waiver for cause or otherwise. True, an attempt is made by appellants to establish a waiver by implication. We submit that the provisions of Section 75(b) do not permit the waiver of a rule of such grave importance as General Order 44 in such a loose and uncertain manner. The appellants base their contention that there was an implied waiver on the statements of the Conciliation Commissioner made at the hearing. [Tr. pp. 72-73.] The substance of the statements was that Mr. Rogers told the Commissioner what attorneys he was going to employ and that the Commissioner told him that he was justified in going ahead and getting them to help. There was nothing in those statements from which a waiver could be implied. It is more reasonable to presume that both Mr. Rogers and the Conciliation Commissioner were familiar with General Order 44 and that Mr. Rogers would in due course seek the proper appointment of himself and the other attorneys in conformity with said general order. Oral statements

made to a judge are no substitute for the petition prescribed.

In re H. L. Stratton, Inc., supra.

The language of Section 75(b) clearly contemplates a formal application to the court and a definite showing that good cause exists for the waiver of the general order. Otherwise, the words "for good cause *shown*," would be meaningless. Those words necessarily imply the presentation of some proof of the existence of a cause sufficient to convince the court that the waiver of the particular general order would be a proper exercise of its discretion.

In *In re Progress Lektro Shave Corp.*, 117 Fed. (2d) 602, the debtor under Chapter 10 was represented by the appellant as its attorney. A trustee for the debtor was later appointed but no attorney for the trustee was appointed. The debtor's attorney performed services for the trustee. The appellant appealed from an order denying compensation. The Circuit Court, in affirming the order of the District Court, stated:

"To recover compensation from the estate for services rendered to the trustee, an attorney must receive appointment under General Order 44. It is true that the appellant acted throughout with the consent and approval of the Referee, but this does not bring him within the proviso of Section 157, 11 U. S. C. A., Sec. 557. The waiver of disinterestedness there permitted must take the form of an appointment under General Order 44 and must be explicit; it cannot take the form of silent acquiescence."

This case does not recognize the right to waive General Order 44 but makes compliance with General Order 44 a condition precedent to the waiver permitted under Section 157, but then provides that the waiver must be explicit.

III.

Failure of the Conciliation Commissioner to Make Findings of Fact and Conclusions of Law in Support of His Order Makes It Invalid.

General Order 37 of the General Orders in Bankruptcy, 11 U. S. C. A., following Section 53, provides in part:

“In proceedings under the Act, the rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these General Orders, be followed as nearly as may be. * * *”

Rule 52(a) of the Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723(c), provides in part:

“In all actions tried upon the facts without a jury, the court *shall* find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment * * *. Requests for findings are not necessary for purposes of review.”

We do not deem it necessary to cite any authorities in support of the proposition and that Rule 52(a) is not inconsistent with the Bankruptcy Act or with General Orders in Bankruptcy.

The foregoing rule has been construed to apply to all hearings before a court, where issues of fact are tried by the court without a jury.

This rule requiring the court to find facts specially and state separately its conclusions of law thereon in non-jury cases is mandatory.

This rule was directly applied in the case of *Perry v. Baumann* (9th Cir., 1941), 122 Fed. (2d) 409, which involved an order dismissing proceedings for agricultural composition upon motion of creditors of alleged farmer-debtor. In granting the motion to dismiss the proceedings, the court made no findings and stated no conclusions. The order of the lower court was reversed on the grounds that Rule 52(a) of the Rules of Civil Procedure apply and should have been followed in this case.

Conclusion.

We respectfully submit that for the reasons and upon the statements and authorities hereinabove set forth, the order appealed from should be affirmed.

Dated: Los Angeles, California, January 19, 1944.

Respectfully submitted,

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